Supreme Court of the United States

OCTOBER TERM, 1969

No. 1082

UNITED STATES OF AMERICA,

Appellant,

—v.—

THOMAS WILLIAM WELLER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

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RELEVANT DOCKET ENTRIES

1969		
Jan.	15	Filed indictment
Feb.	18	Filed defendant's motion to dismiss indictment
Apr.	25	Filed defendant's memorandum in support of motion to dismiss
May	23	Filed government's answer in opposition to motion to dismiss
Sept.	19	Entered order granting motion to dismiss
Oct.	17	Filed government's notice of appeal

[Filed Jan. 15, 1969, C. C. Evensen, Clerk]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

Criminal No. 42614

VIOLATION: Title 50 Appendix, U.S.C., Section 462—Refused to Submit to Induction.

UNITED STATES OF AMERICA, PLAINTIFF

v.

THOMAS WILLIAM WELLER, DEFENDANT

INDICTMENT

The Grand Jury charges: THAT THOMAS WILLIAM WELLER, defendant herein, on or about July 10, 1968, in the City of Oakland, County of Alameda, State and Northern District of California, did wilfully and knowingly fail and neglect to perform a duty required of him under and in the execution of the Military Selective Service Act of 1967, and the rules, regulations, and directions duly made pursuant thereto, in that he, having reported for induction as ordered by his Local Board, and having been found fully qualified for service, did then and there refuse to submit to induction into the Armed Forces of the United States.

A True Bill

/s/ J. Y. Tapley
Foreman

/s/ Cecil F. Poole
CECIL F. POOLE
United States Attorney

[Filed Feb. 18, 1969, C. C. Evensen, Clerk]

FRANCK & HILL
PETER FRANCK, ESQ.
2905 Telegraph Avenue
Berkeley, California 94705
Telephone: 845-4123

Attorneys for Defendant

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 42614

UNITED STATES OF AMERICA, PLAINTIFF

vs.

THOMAS WILLIAM WELLER, DEFENDANT

MOTION TO DISMISS INDICTMENT (RULE 12)

TO THE UNITED STATES OF AMERICA, and to CECILE F. POOLE, Esq. Its attorney:

YOU AND EACH OF YOU, WILL PLEASE TAKE NOTICE that on the 11 day of March, 1969, or as soon thereafter as counsel can be heard, the defendant herein will move the court for its order dismissing the indictment heretofore rendered and filed herein, upon the grounds that:

1. There is no basis in fact for the denial of defendant's application for classification 1-O (Conscientious Objector);

2. Defendant's right to the due process of law as guaranteed by the Fifth Amendment of the Constitution of the United States has been denied to defendant in that:

a) The Administrative proceedings had prior to the issuance of an order to report for induction

completely failed to apprise the defendant of the standards and requirements being applied to the evaluation of his claim;

b) Defendant was denied the right to counsel in the administrative proceedings;

c) Defendnat [*sic*] was denied the right to present witnesses on his behalf; and

d) Defendant and this Court have been denied the right to make and present a record of the administrative proceedings herein.

This motion to dismiss, pursuant to Rule 12 of the Federal Rules of Criminal Procedure, will be based upon this Notice, upon Memorandum of Points and Authorities to be served herein, upon the files and records before this Court, and upon such evidence and arguments as may be adduced at the hearing hereon, or prior thereto.

DATED: February 17, 1969.

FRANCK & HILL

By /s/ Peter Franck
PETER FRANCK
Attorneys for Defendant

EXTRACTS FROM APPELLEE'S SELECTIVE SERVICE FILE
(EXHIBIT A TO MOTION TO DISMISS)

* * * *

(Registrant Will Make No Entries on This Page)

Dates	Minutes of Actions by Local Board and Appeal Board and on Appeal to the President	Vote Yes	Vote No
May 14 1964	Classified II-S	5	0
May 27 1964	SSS 110 Mailed		
Jul 21 1964	Student status form mailed		
Oct 29 1964	Classified II-S to 6/65	3	—
Nov 12 1964	SSS 110 Mailed		
Jul 5 1965	Student status form mailed, & letter		
Oct 27 1965	Classified IA	2	—
Nov 24 1965	SSS 110 mailed		
1-3-66	SSS Form 223 Mailed (Order to report for Phys. Exam.) 1-27-66		
3-1-66	Pending waiver		
3-30-66	DD form 62 mailed T. REJ. xxy 47 & 88 mailed to Hdq.		
Apr 13 1966	Classified I-Y	2	—
Apr 27 1966	SSS 110 Mailed		
Feb 20 1967	SSS Form 127 Mailed		
2-28-67	SSS Form 127 Received		
3-6-67	Form C-71 mailed.		
3-29-67	Form C-71 received.		
May 3 1967	SSS Form 223 Mailed (Order to report for Physical Examination) (5-22-67)		
6-14-67	Pending waiver [illegible]—case on appeal		
6-15-67	DD Form 62 mailed ACC		

Dates	Minutes of Actions	Vote Yes	Vote No
Jul 12 1967	Classification I-A	3	—
Jul 18 1967	SSS 110 & 217 Mailed		
Aug 4 1967	SSS 150 Mailed		
Aug 10 1967	SSS Form 150 Received		
8-17-67	Appeal Filed by Registrant		
9-13-67	Classification I-A (write letter re pers app)	3	—
Sep. 21 1967	SSS 110 & 217 Mailed		
10-18-67	Personal Appearance Requested by Registrant		
10-31-67	C-310 mailed to registrant. Personal Appearance scheduled for Nov. 8, 1967 at 1:00 P.M.		
11-8-1967	Pursuant to telephonic discussion between local board members on November 7, 1967 re: request of registrant through letter from Attorney, received November 6, 1967, Board took the action with respect to requests in Attorney's letter which action is set forth in Board's letter dated November 7, 1967 to Peter F. Franck. Contents of this letter were given orally by telephone to Mrs. Hermes, Attorney at Law, in Mr. Franck's office and letter was mailed this date. Board this date confirms the action set forth in letter of November 7th 1967, refuses to have Counsel present at Personal Appearance, refuses to have witnesses speak orally, on behalf of registrant at Personal Appearance and refuses to have stenographer present at proceedings at Personal Appearance.	3	—

Dates	Minutes of Actions	Vote Yes	Vote No
11-8-67	On pers. appearance. Hold for 10 days for further documents from Registrant. Pers. App. held this date	3	—
Dec. 1, 1967	Letter received from Attorney Peter Franck dated Nov. 30, 1967.		
12/13/67	Case Reviewed & I-A retained & case not re-opened. Board determines that oral witnesses will not be heard and that stenographic reporter will not be present. Classified I-A Send to Appeal Board	2	—
12-18-67	Letter mailed to registrant.		
Dec 21 1967	SSS 110 and 217 Mailed		
1-3-68	Letter rec'd from reg with appeal.		
1-10-67 [*sic*]	Case reviewed, not reopened & I-A is retained Send to App. Bd. The I-A was given this Reg. 9-13-67 & we are not required to give a new I-A now	3	—
1/24/68	Mailed C-140 to Registrant		
1/24/68	Complete file forwarded to Appeal Board. SSS 120 attached.		
5-22-68	Classified I-A by the Appeal Board	4	0
5-23-68	Complete file received from the Appeal Board		
May 31 1968	SSS Form 110 Mailed		
6-14-68	SSS Form 252 and DD Form 398 Mailed (Order to Report for Induction) (7-10-68)		

	Minutes of Actions	Vote Yes	Vote No
7-19-68	Letter received from Armed Forces Examining and Entrance Station Registrant refused to submit for Induction.		
7-24-68	Complete file forwarded to State Headquarters for review and determination whether to report to the U.S. Attorney as a delinquent.		
8-9-68	Complete file returned from State Headquarters with authority to report to United States Attorney as a delinquent on SSS Form 301		
8-20-68	SSS Form 301 mailed (Delinquent Registrant Report) to United States Attorney.		
9-19-68	Cover sheet and complete file forwarded to State Headquarters per request of September 18, 1968. SSS Form 1 affixed.		

* * * *

[Received Oct. 18, 1967, Sacramento Local Board Group]

PETER F. FRANCK
Attorney at Law
2890 Telegraph Avenue, Berkeley 5, California

JEANETTE A. HERMES

THornwall 5-4123

FRANCIS HEISLER
Of Counsel

October 17, 1967

Selective Service System
Local Board No. 22
Post Office Building, Rm. 423
8th and I Streets
Sacramento, California 95814

re: Thomas W. Weller
SS No. 4 22 44 351

Gentlemen:

Pursuant to the notice contained in your Form 217, enclosed please find my client's request for a personal appearance before your board.

I will appreciate it if you will inform me as to the time and place of said hearing.

Very truly yours,

/s/ Peter Franck
PETER FRANCK

PF:h
Encl.

CERTIFIED MAIL—RETURN RECEIPT
SPECIAL DELIVERY.

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October 16, 1967

Selective Service System
Local Board No. 22
Sacramento, California

Gentlemen:

I wish to request an appointment for a personal appearance before your board with regard to my seeking classification as a conscientious objector.

Sincerely,

/s/ Thomas W. Weller
THOMAS W. WELLER
Selective Service No.
4-22-44-351

SELECTIVE SERVICE SYSTEM

Local Board No. 22
Federal Building, Room 423
801 I Street
Sacramento, California 95814

(Local Board Stamp)

October 31, 1967

Thomas W. Weller
2990 Adeline Avenue
Berkeley, California

SS No. 4 22 44 351

Dear Sir:

Your request for a personal appearance before your local board is acknowledged.

We have made an appointment for you to appear before your local board at the address given above at 1:00 p.m. on November 8, 1967.

Section 1624.2 (b) of the Selective Service Regulations provides that "At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. *Such information shall be in writing, or, if oral, shall be summarized in writing by the registrant* and, in either event, shall be placed in the registrant's file."

BY DIRECTION OF THE
LOCAL BOARD

/s/ Idahleen Thompson
Clerk

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[Received Nov. 6, 1967, Sacramento Local Board Group]

PETER F. FRANCK
Attorney at Law
2890 Telegraph Avenue, Berkeley 5, California

JEANETTE A. HERMES — THornwall 5-4123

FRANCIS HEISLER
Of Counsel

Selective Service
Local Board No. 22
Post Office Bldg. Rm. 423
8th & I Streets
Sacramento, California
95814

Re: Thomas W. Weller
SS. No. 4 22 44 351

Dear Sirs,

My client, Mr. Thomas Weller informs me that you have sent to him a notice of time and place for his personal appearance before your board. Please have reference to my letter of October 17, 1967, wherein I requested that you forward said notice to this office.

Mr. Weller has requested that I be present at the hearing, along with his witnesses, to advise him with respect to his rights.

Further, he wishes to bring with him to the hearing several people who are well acquainted with him to speak to you on his behalf, in support of the sincerity and conscientiousness of his opposition to war. I have advised Mr. Weller of the importance of making a good record of the proceedings, and he requests that, in order that he be able to concentrate his attention on giving your Board members the best possible understanding of his position, he be permitted to bring with him a stenographer to record the proceedings, for the benefit of his records, and to aid the deliberations of the appeal board, in the event that should become necessary.

In view of the fact that Mr. Weller's witnesses, recorder, and legal advisor will have to travel to Sacramento for the hearing, it is requested that you grant permission for their attendance at the hearing in advance.

Thank you very much for your consideration in this matter.

Very Truly Yours,

/s/ Peter Franck
PETER FRANCK

Local Board No. 22
Federal Building, Room 423
801 I Street
Sacramento, California 95814

November 7, 1967

Mr. Peter F. Franck
Attorney at Law
2890 Telegraph Avenue
Berkeley 5, California

Dear Sir:

It appears from your written request, undated, that Thomas W. Weller, SSS No. 4-22-44-351, has requested the following to be accomplished at his Personal Appearance, on November 8, 1967.

(1). That Mr. Peter F. Franck be present at the hearing as his attorney.

(2). That witnesses also be present to speak in his behalf.

(3). That a stenographer to record the proceedings be present.

Under Section 1624.1 (b), of the Selective Service Regulations it states in part **And provided further, that no registrant may be represented before the local board by anyone acting as attorney or legal counsel, therefore request No. 1 above is refused.

With respect to request No. 2, the local board has exercised its discretion and decided that it will not hear witnesses at this Personal Appearance. These witnesses should submit their testimony in writing and it will be considered by the board.

Under Section 1624.1 (b), of the Selective Service Regulation states in part. No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant**.

If at the Personal Appearance the Board feels there is any reason to hear witnesses, it will so advise the registrant and will set a further date for such purpose.

With respect to request No. 3, the Board in exercising its discretion denies the request to have a stenographer to record the proceedings.

Under Section 1624.2, Appearance before Local Board, of the Selective Service Regulation, paragraph (b) states in part **Such information shall be in writing, or if oral, shall be summarized in writing by the registrant, and in either event, shall be placed in the registrant's file.**

You may advise Mr. Weller to come prepared with a written summary of the oral points he wishes to raise at the Personal Appearance. It will be filed and considered along with his oral statements at the Personal Appearance.

Respectfully,

/s/ Ralph T. Lui
R. T. LUI, Chairman
Local Board No. 22

rl/it
cc: Thomas W. Weller
Above telephoned to Mrs. Hermes, this date

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[Received Nov. 8, 1967, Sacramento Local Board Group]

Local Board No. 22
Federal Building, Room 423
801 I Street
Sacramento, California 95814

November 8, 1967

PERSONAL APPEARANCES

SUBJECT: WELLER, Thomas W.
SS No.: 4 22 44 351

Registrant appeared for his personal appearance before the Local Board members at the address given above on November 8, 1967. Board members present: Mr. Ralph T. Lui, Chairman, Mr. Frank Goldstein, Secretary and Mr. Alfred I. Scott, member.

Registrant stated he doesn't belong to any church, has arrived at his beliefs independently, entire world governed by a profound religious principle. Registrant stated:

"There is a certain kind of person I want to be and there are certain things I can't do and be that person. One thing is to be part of organized violence, army is that sort of thing and I can't be in that sort of thing. An Army follows its orders. It is organized to kill at random and not to make moral judgements."

"I could not kill unless I could make a moral judgement in each instance."

"I couldn't serve as a Medic. At some point, I have to take a stand and I can't be part of the Army."

"I could imagine that circumstances could arise that I could use violence in a certain case and my moral sense would permit me to use it, but in the Army I would be obligated to use violence in all cases whether my moral judgement would permit me or not. In the Army one implicitly accepts the use of violence and this is essential

to the nature of serving in it in a combatant or non-combatant capacity."

Registrant was read above in quotes and agrees it is substantially okeh.

Registrant stated: "Where my beliefs come from, I don't know. I have in my mind this intuitive idea, mystical, of what sort of a person I have to be. I attribute that idea to a religious source. I don't think the source of religion is written down, for me at least, or in any religious body. It is inherent in what I see around me in the world and how I feel about it. I feel that this feeling is deep and I'd go to jail if necessary."

Registrant was read above in quotes and agrees it is substantially okeh.

The registrant was advised that he has ten days to get in his written summary of his oral presentation and to send in letters from persons who wish to give information as to his beliefs.

We would then decide whether further oral witnesses would be permitted.

• • • •

[Received Nov. 15, 1967, Sacramento Local Board Group]

PETER F. FRANCK
Attorney at Law
2890 Telegraph Avenue, Berkeley 5, California

JEANETTE A. HERMES

THornwall 5-4123

FRANCIS HEISLER
Of Counsel

November 14, 1967

Mr. R. T. Lui, Chairman
Local Board No. 22
Federal Building, Room 423
8th and I Streets
Sacramento, California 95814

Re: WELLER, Thomas W.
SS No. 4 22 44 351

Dear Mr. Lui:

Thank you for your letter of November 7, 1967, in the captioned matter. With regard to request No. 1, the right to counsel, I would like to make two points for your consideration.

In the first place, I propose to be present to advise my client as to his rights, and to aid him in any way I could with his presentation of his case to your board. This function is quite distinct from that of *representation* which is all that the cited regulation bars. "No registrant may be represented before the local board . . .".

Second, and of very great importance, is the fact that the cited regulation was drawn and enacted at a time when the law provided for full field investigation of concientious objector claims by the FBI, followed by a detailed review by the Justice Department, including a hearing before a trained hearing officer in which counsel was allowed and witnesses were heard and a record was

made. As you know, recent amendments to the Selective Service Act have eliminated the latter procedure. The appearance before the local board is now the one and only time wherein a registrant may have any kind of a hearing, present his case in person, present testimony on his behalf, and meet his accusers, in the sense that he may determine the reasons for prior denial of his claim.

The Supreme Court of the United States had many occasions in recent years to construe the due process requirements of the Constitution with respect to the question of the right to counsel, and every case has upheld that right where the proceeding involved a matter of the liberty and substantial personal rights of the individual. Clearly, this is such a case.

In view of the substantially changed circumstances, I think it would be advisable for all parties if you would determine whether the Selective Service System has made a determination of the validity of the prior requirement with regard to exclusion of counsel.

With respect to what you refer to as request No. 2, I would like to point out that one of the factors which your board should be considering most carefully at such a hearing is the registrant's sincerity. I do not feel that there is any basis for assuming that sincerity can be judged as well from the written word of the witness as from the oral presentation. Therefore, I would respectfully inquire as to the basis of the exercise of the board's discretion in this matter.

With respect to your citation of Regulation No. 1624.2, while this authorizes the registrant to summarize the information he provides, it does not provide for recording of other aspects of the proceedings, including questions and remarks by the members of the board. It is difficult for me to understand why this regulation is construed to bar what is obviously a preferable procedure for making a record, so long as the registrant is willing to bear the extra cost.

I would hope that your board would consider these matters of constitutional due process very seriously, ob-

tain appropriate guidance from the Selective Service System, and the Justice Department, and very seriously consider our request that you grant my client a hearing in which the requirements of due process are met.

Thank you for your attention.

Very truly yours,

/s/ Peter Franck
PETER FRANCK

PF:mw

Local Board No. 22
Federal Building, Room 423
801 I Street
Sacramento, California 95814

November 17, 1967

Mr. Peter F. Franck
Attorney at Law
2890 Telegraph Avenue
Berkeley 5, California

Subject: Weller, Thomas William
SS No.: 4 22 44 351

Dear Sir:

With reference to your letter of November 14, 1967, I call your attention to the fact that at the registrant's personal appearance on November 8, 1967, he was advised that he had ten days from November 8, 1967 to submit the written statements of his witnesses to us. Also, registrant's attention was called to the Form C-310 notice mailed to him on October 31, 1967, which states in part; "Section 1624.2 (b) of the Selective Service Regulations provides that, 'At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing by the registrant and, in either event, shall be placed in the registrant's file'." The registrant did not come with the written summary referred to therein, so was asked to submit this within the ten day period.

The registrant, under date of November 14, 1967, has submitted two letters of witnesses, but has not submitted written summary, which he was privileged to submit. While his failure to submit such written summary will in no way draw any detrimental inferences by this board,

I call this omission to your attention so that he may supply us with such a summation if he desires.

Your current letter of November 14, 1967, proceeds on an assumption that this board has continued the personal appearance to a further date beyond November 8, 1967, the day on which it was held. This assumption is incorrect. The personal appearance was afforded the registrant on November 8, 1967 and this board has merely postponed for ten days, its review of the case pending receipt of the written documents referred to herein. The board has held open the determination as to whether oral presentation of witnesses will be permitted, until after its examination of the written statements. The meeting at which this determination will be made is not part of the personal appearance of the registrant, but is part of the review by the board of the case after the personal appearance, during which review the registrant is not present.

If at this review a determination is made to permit oral testimony, we will at that time inform you as to the board's decision relative to your request in your letter of November 14, 1967. If the board's determination is not to permit the taking of oral testimony, your request to be present then becomes moot.

We are extending the time within which to submit any further written matters for our review, to December 7, 1967, after which we will review the file as set forth herein.

Yours very truly,

FOR THE BOARD

/s/ Ralph T. Lui
RALPH T. LUI, Chairman
Local Board No. 22

[Received Dec. 1, 1967, Sacramento Local Board Group]

PETER F. FRANCK
Attorney at Law
2890 Telegraph Avenue, Berkeley 5, California

JEANETTE A. HERMES

THornwall 5-4123

FRANCIS HEISLER
Of Counsel

November 30, 1967

Local Board No. 22
Federal Building, Room 423
801 I Street
Sacramento, California 95814

Re: WELLER, Thomas William
SS No. 4 22 44 351

Dear Sirs:

Enclosed please find the original summary of my client's hearing before your Board. If this summary is in any way incorrect, I will appreciate it if you will so notify us within seven days so that we may correct the record.

In submitting this material, we in no way waive the previous request made for a hearing wherein the basic performance of due process of law are observed.

In matters such as this one, these are not mere empty formalities. There is a great and probably growing gap between the generations in our Nation. Communication across this line is difficult under the best of circumstances. Young people do not use the same words and language, or, when they do they may mean quite different things. In a period when they feel an increased alienation from the formal institutions of our society, to ask them to communicate their deep and heartfelt beliefs through cold, formal, letters, is unrealistic. Only through

a real hearing where there is an opportunity for a registrant and his friends to come and together attempt to communicate with you the beliefs they hold deeply and strongly can there be any hope of real communication. Without real communication there [*sic*] constitutional rights to a fair hearing cannot be vindicated.

I trust you will seriously consider these matters.

Very truly yours,

/s/ Peter Franck
PETER FRANCK

PF:mw
Enclosure

The Spokesman or Chairman of the board explained that he had gotten the letter requesting that I be allowed to have an attorney, witnesses, and a stenographer present at the hearing, and that he had talked to Mrs. Hermes on the telephone. He explained the board's reasons for denying those requests, and gave me a copy of a letter setting forth those reasons. He suggested that I could have the witnesses that I had wanted to be present send letters to the board, and that the board would delay its decision "a week or ten days" for that purpose. He said that their function there was to try to form an idea of what my ideas were like and what kind of a person I was through an informal conversation; that they would not be asking any trick questions or trying to change my mind; that they would permit me to "carry the ball" as regards to what I felt I should tell them.

I asked them what they thought were valid grounds for conscientious objection, and whether they thought that certain sorts of religious beliefs and background were necessary and what they were.

The spokesman replied that it was not their function to judge such legal questions.

I said that I felt that I was, as a CO, necessarily involved with those questions, whether they were or not.

The spokesman repeated some of his earlier statements about how the board operated, and said that while it was probably a clearer case in type case [*sic*] of a Jehovah's Witness or similar religious affliations, in a case like mine, they were faced with a more difficult problem.

I said that it must be difficult to judge the sincerity or depth of belief of a person with beliefs of his own making, as opposed to a person of a conventional religious affiliation, but that the two beliefs might well be equally real, to which the board members indicated assent.

I then said that I could perceive within myself an image of the sort of person that I should be and that this image was inconsistent with the sort of person military service would require me to be. People in the military service prepare, train, and equip themselves for killing and violence, and must accept as their own the goals of the military organization, namely, killing and violence. I stated that I could never take the step of accepting those goals and that way of life by becoming a part of a military organization, even as a non-combatant member.

The chairman asked at that point if I was really familiar with the nature of the medics. He explained that medics in the field need not accept orders from the combat command if such orders violated their non-combatant status, and that in fact medics were not permitted to carry guns.

I replied that going in the service even in such a case required pledging one's loyalty to an organization whose goals were violent ones and implicitly accepting those goals thereby.

The spokesman said that he wanted to get as clear as possible an idea of my views on whether violence was ever justifiable, and as I spoke he attempted to briefly paraphrase what I said, repeatedly asking me if his paraphrase was substantially correct, and writing down his paraphrase.

I stated that violence would conceivably be justifiable to me in a situation where the effect and its goal were

perfectly clear, that is, in a situation where I could see the danger, and exactly what measured use of force would stop it. This is different from war where, while the means are generally agreed to be evil, the effect of the application of these means and the goal are uncertain and very different from the institution of the army where the soldier necessarily accepts the idea of training and preparing himself to use violence *whatever* the goal. The soldier accepts orders from whoever is in power whether it be a Johnson or a Hitler, not caring about the purpose.

The spokesman then asked if there was any more I had to say, adding that he had to ask that question of everyone so as to be sure they got a fair hearing.

I said that I would like to say more about the origins of my beliefs. The spokesman carefully paraphrased and recorded this part also, as above.

I stated that I was not certain of the origin of my beliefs and their religious nature, but that I was certain of their depth. Religion for me is no [*sic*] in written revelation or in organized religious bodies. It comes from my living in the world, and what I feel about it. It gives me an intuitive feeling of what I want to be like and I feel I must live up to it. There is no way to communicate to you whether this feeling is shallow or deep, but I know that it is deep enough that I would go to jail for it.

A board member asked, since I stressed the importance of knowing the danger and how a given application of force would stop it in determining whether violence was justified, that if I knew what President Johnson knows, might I not do the same?

I assured him that if I were in Johnson's position, I wouldn't maintain an army, much less a war.

He suggested that that was essentially the case at the time of Pearl Harbor, when we were "caught with our pants down".

I pointed out that if we had not had a military base at Pearl Harbor, the Japanese would not have bombed it. I then attempted to make it clear that I categorically

denied the possibility of knowing when violence was justified in the arena of world history. No one ever really knows enough to say, "if we don't do A, B will happen". So in essence, it is a matter of trading a certain evil for a possible evil. There has never been enough justification for unleashing the terrible distate [*sic*] of war on the world.

At this point we mutually agreed to end the proceedings.

The foregoing is as accurate a reconstruction of my hearing as I can make from memory.

/s/ Thomas W. Weller
THOMAS W. WELLER

DATED: November 30, 1967

Local Board No. 22
Federal Building, Room 423
801 I Street
Sacramento, California 95814

4 22 44 351

December 13, 1967

Mr. Thomas W. Weller
2990 Adeline Avenue
Berkeley, California

Dear Sir:

From examination of entire case, board determines that permission is denied to present oral witnesses on behalf of registrant. Registrant having been afforded opportunity to present letters of witnesses and a summary of personal appearance, the board this date has reviewed the case, has not reopened same, and retains registrant in his present 1-A classification.

Yours very truly,

FOR THE BOARD

/s/ Ralph T. Lui
RALPH T. LUI, Chairman
Local Board No. 22

cc: Mr. Peter F. Franck

• • • •

[Received Dec. 28, 1967, Sacramento Local Board Group]

PETER F. FRANCK
Attorney at Law
2890 Telegraph Avenue, Berkeley 5, California

JEANETTE A. HERMES

THornwall 5-4123

FRANCIS HEISLER
Of Counsel

December 27, 1967

Ralph T. Lui, Chairman
Local Board No. 22
Federal Building, Room 423
801 I Street
Sacramento, California 95814

Re: WELLER, Thomas William
SS No. 4 22 44 351

Dear Mr. Lui:

I am in receipt of your letter of December 13, 1967, in the captioned matter.

Please note that on behalf of my client, I make exception to the actions taken by your board as contrary to law and Selective Service regulations and that it is not justified under the circumstances. I ask that you reconsider these actions.

Whether or not you reconsider these actions, I wish to draw your attention to the faut [*sic*] that your action in "not reopening" and "retaining" the registrant in his present 1-A classification is incorrect and inappropriate under the circumstances. Where a claim for conscientious objection is presented, and the board determines not to grant 1-O classification, it must take a new classification action, albeit, classifying into the samd [*sic*] 1-A classification. To fail to do so would appear to be noth-

ing other than an attempt to prevent the registrant from exercising his right to appeal from your board's decision. It is requested that you take the appropriate action.

On behalf of Mr. Weller, please take notice that he hereby appeals from your decision, both as to the procedural matters which we have raised and as to the denial of the classification 1-O.

Very truly yours,

/s/ Peter Franck
PETER FRANCK

PF:mw

[Received Jan. 3, 1968, Sacramento Local Board Group]

December 29[?], 1967
[date not clearly legible]

Selective Service System
Local Board No. 22
Sacramento, California

Dear Sirs:

I have recieved [*sic*] your letter of December 13. I appeal to the Appeals Board from your decision not to classify me 1-O, and from your decision denying me the right to present witnesses before you, to make a record of your proceedings, and to have counsel present.

Sincerely,

/s/ Thomas W. Weller
THOMAS W. WELLER
SS No. 4-22-44-351

• • • •

[Filed Sep. 19, 1969, C. C. Evensen, Clerk]

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

No. 42614

UNITED STATES OF AMERICA, PLAINTIFF

vs.

THOMAS WILLIAM WELLER, DEFENDANT

ORDER GRANTING MOTION TO DISMISS INDICTMENT

The Defendant has made a motion to dismiss the indictment against him pursuant to Fed. R. Crim. P. 12. Defendant contends that his constitutional rights were violated because his request to have his attorney present during the personal appearance on his conscientious objector claim was denied pursuant to 32 C.F.R. § 1624.1 (b) which provides:

> . . . no registrant may be represented before the Local Board by anyone acting as attorney or legal counsel.

Alternatively, the defendant contends that the section of 1624.1(b) quoted above is not authorized by the Selective Service Act of 1967, 50 U.S.C.A. App. § 451, et seq.

The pertinent facts, which are apparent from the Defendant's Selective Service file, are as follows: The Defendant requested, received and filed with his local board a Form 150 (Special Form for Conscientious Objector). The board classified the Defendant I-A and the Defendant requested a personal appearance. The Board scheduled the appearance for November 8, 1967. The Board received a letter from the Defendant's attorney on November 6, 1967 which requested that the board grant Defendant's attorney permission to be present at the personal appearance to advise him with respect to his rights. Relying on 32 C.F.R. § 1624.1(b), the board denied the requested permission. Following the hearing, the Defendant's board declined to reopen his case and retained him in class I-A. The Defendant then unsuccessfully appealed this classification.

There is no question that the hearing before the local board on a registrant's claim for conscientious objector status is a critical stage of an administrative process at which substantial rights are adjudicated. The failure to sustain one's claim can result in requiring a registrant to serve his country in a manner different both in type (a I-A-O serves in the armed services in a non-combatant capacity) and in hazard (a I-O performs non-military alternative service in the national interest).

In *Greene* v. *McElroy*, 360 U.S. 474, (1959), the Supreme Court held that the administrative denial of traditional forms of fair procedure, particularily where substantial constitutional doubts are raised, are not to be presumed to be authorized "by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." The *Greene* case dealt with the administrative withdrawal of security clearance causing the plaintiff's loss of a job in private industry, and the procedural safeguards which were missing were the right to confrontation and cross-examination of those who gave information adverse to Mr. Greene. Certainly, failing to establish a conscientious objector claim is as serious as the impact of loss of the right to have access to classified information (hardly what most people would consider to be a "right"). The right to counsel is also a traditional safeguard, and the only apparent reason it was not dealt with in *Greene* is because Mr. Greene was represented by counsel in all of his proceedings. Indeed, of what value would be the right to confrontation and cross-examination without the right to counsel skilled in those arts? It seems clear that the affirmative denial of the right to be represented by retained counsel, even in a "civil" proceeding, where substantial loss of liberty may be at stake, is subject to grave constitutional doubts. *In re Gault*, 387 U.S. 1 (1967).

In spite of the fact that the *Greene* court did not decide that the plaintiff had a *constitutional* right to confrontation and cross-examination, the court held that plaintiff had such rights because the "Nation's lawmakers" did not *explicitly* authorize their withdrawal by the Defense Department. Accordingly, in the case at bar,

the only "lawmakers" who could explicitly authorize the denial of counsel in hearings before the local draft boards are Congress, not the President, since the President could not raise an army, through induction, without the authority of Congressional legislation.[1] However, nowhere in the Act has Congress expressly denied the right to counsel or expressly delegated the power to do so to the President. The only possible sources of such a delegation are Section 1(c) which states that service should be "in accordance with a system of selection which is fair and just. . . .," and section 19(b)(3) [*sic:* should read "10(b)(3)"] which provides "such local boards . . . shall, under rules and regulations prescribed by the President, have the power . . . to hear and determine . . . all questions and claims with respect to . . . exemption. . . ." These sections clearly are not "explicit action by the Nation's lawmakers" (in this case Congress) taking the constitutionally-suspect action of removing the right to be represented by counsel.

In *Greene* the argument was made that delegation of the power pruning the traditional procedural rights should be found because of Congressional and Presidential acquiesence in the program. The court dismissed the contention as follows:*

> If acquiescence or implied ratification were enough to show delegation of authority to take actions with-

[1] While under Article 2 § 2 of the Constitution the President is Commander in Chief of the Armed Forces (See *Cafeteria Workers* v. *McElroy*, 367 U.S. 886), under Article 1 § 8, Congress, not the President, (See *Swaim* v. *United States*, 28 Ct. Cl. 173, *Aff.* 165 U.S. 553 (1893); 6 Op. Atty. Gen. 10 (1853)), is given the power to provide for the common defense, to declare war, to raise and support armies, to provide and maintain a navy and to make all laws necessary and proper for the execution of those powers. It is pursuant to these Congressional powers that the Selective Service Act of 1967 was passed, and it was obviously upon the premise that only Congress could raise an army that Congress found it necessary to authorize the President "to select and induct into the Armed Forces of the United States for training and service in the manner provided in this title, . . such number of persons as may be required to provide and maintain the strength of the Armed Forces." 50 U.S.C.A. App. § 454(a).

* 360 U.S. at 506, 507.

> in the area of questionable constitutionality, we might agree with respondents that delegation has been shown here. . . . We deal here with substantial restraints on employment opportunities of numerous persons imposed in a manner which is in conflict with our long-accepted notions of fair procedures. Before we are asked to judge whether, in the context of security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, *within their respective constitutional powers*, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. . . . Such decisions cannot be assumed by acquiescence or non-action . . .. They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized . . . but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government are not endowed with authority to decide them.
> [Emphasis added.]

Greene, therefore, is persuasive authority for the proposition that 32 C.F.R. § 1624.1(b) is not authorized by the statute.

Six years prior to *Greene* the Supreme Court decided *United States* v. *Nugent*, 346 U.S. 1 (1953) (5-to-3 decision). The defendant contended that the requirement of a "hearing" under the then-existing section 6(j) of the Selective Service Act meant that he should be entitled to cross-examine those who gave statements to the F.B.I. deliterious [*sic*] to his claim. The Court denied this claim, feeling that the "6(j) hearing" was not a "determinative" one and that there was "no time" for "litigious

interruption." The first reason is not applicable to our situation because now the hearing before the board is determinative. Reason two is not persuasive and was not followed in *Greene*. If litigious delays of potential members of the armed forces are of concern, *a fortiori* such delays regarding those already in the service are of equal if not greater concern. Yet, counsel participate in hearing with respect to members of the army who claim conscientious objector status. Army Regs. 635-20, para. 4(d) (Jan. 22, 1969). Finally, *Nugent* was not a "right to counsel" case, and the governmental interest in protecting sources of confidential information is more compelling that [*sic*] preventing a possible slight delay caused by the presence of retained counsel at a registrant's personal appearance. Indeed, counsel was permitted to participate in the "6(j) hearings". *Storey* v. *United States*, 370 F.2d 255 (9th Cir. 1966).[2] As Mr. Justice Frankfurter so eloquently stated in his dissent:

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[2] It is interesting to note that following the *Greene* case President Eisenhower, in Executive Order 10,865, set up a security clearance procedure which included the opportunity to be represented by counsel. Exec. Order No. 10,865, 25 Fed. Reg. 1583 (1960), as amended in 3 C.F.R. § 512 (1968). The *Nugent* case was subsequently followed in *Gonzales* v. *U.S.*, 364 U.S. 59 (1960). Petitioner claimed denial of due process because he was denied, at trial, the right to have the Justice Department hearing officer's report, as well as the original report of the F.B.I. The Court rejected this claim, holding that neither was relevant at trial as the case "centered entirely on the Department's recommendation, which petitioner repudiated, but which both the appeal board and the court below found supported by the record." 364 U.S. at 64. Although "following" Nugent, the Court concluded that: "This is not to say that there might not be circumstances in a particular case where fairness in the proceeding would require production. *No such circumstances, as foundation for a claim of actual unfairness, are before us.*" 364 U.S. at 65. [Emphasis added.] Therefore, the holding in *Gonzales* is not persuasive in deciding the case at bar, because it was based wholly on the Court's conclusion that the facts demonstrated that Gonzales suffered no unfairness due to the denial of production of the documents. The reasoning of the *Greene* court, to the contrary, is much like the present case, because the possibility of unfairness to petitioner Greene—certainly no greater than to defendant Weller—led the Court to hold that the denial of traditional safeguards was not to be inferred, but rather required explicit authorization.

> Considering the traditionally high respect that dissent, and particularly religious dissent, has enjoyed in our view of a free society, this Court ought not to reject a construction of congressional language which assures justice in cases where the sincerity of another's religious conviction is at stake, and where prison may be the alternative to an abandonment of conscience. *The enemy is not yet so near the gate that we should allow respect for traditions of fairness, which has heretofore prevailed in this country, to be overborne by military exigencies.*
> 346 U.S. at 12, 13. [Emphasis added.]

The right to counsel has been considered increasingly important in recent years. Indeed, the Supreme Court has held it to be such a fundamental right that even in juvenile proceedings, supposedly non-adversary, the youth has a constitutional right to counsel of his own:

> The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The child 'requires the guiding hand of counsel at every step in the proceedings against him.'
>
> *In re Gault, supra.*, at 36. [Citations omitted.]

Even though the right to counsel has been so considered, lower federal courts have consistently taken the position that there is no right to be represented by retained counsel at Selective Service hearings. *Nickerson* v. *United States*, 391 F.2d 760 (10th Cir.), *cert. denied* 392 U.S. 970 (1968); *United States* v. *Dicks*, 392 F.2d 524 (4th Cir. 1968); *United States* v. *Capson*, 347 F.2d 959 (10th Cir. 1965); *Tantash* v. *United States*, 409 Fed. 2d 227 (9th Cir. 1969); *Haven* v. *United States*, 403 Fed.2d 384 (9th Cir. 1968). In most of the cases in which the matter has been raised, the courts have either dismissed it with no discussion, placed their reliance on the fact that the personal appearance of the registrant before the board is not at a criminal proceed-

ing within the ambit of the 6th Amendment, or held that failure to request counsel deprived the registrant of standing to raise the issue. (E.g., *Haven, supra.*) In still other cases the Court's language has merely been dictum. See *Tantash, supra; Haven, supra.* No case cited to the Court by the government or found by this Court has addressed itself to the apparent lack of specific authorization in the Selective Service Act for the denial of counsel before the local boards.

The often-abbreviated and sometimes-cryptic treatment of this traditional procedural safeguard has persisted in spite of the many significant procedural developments in other areas of the law. While conscientious objector status may be a "privilege" and not a "right" (See *Uffelman* v. *United States*, 230 F.2d 297 (9th Cir. 1956)), it is now established that the government may not distribute its largesse in a manner which ignores traditional procedural safeguards. Although the issuance of a liquor license would hardly be considered by most a "right", nevertheless an applicant for a liquor license has far more procedural rights than a Selective Service registrant whose life may ultimately be placed in jeopardy. See *Hornsby* v. *Allen*, 326 F.2d 605 (5th Cir. 1964). Likewise a welfare recipient has more procedural rights than a Selective Service registrant, see *Kelly* v. *Wyman*, 294 F.Supp. 893 (S.D. N.Y. 1968) (three judge court), as does an applicant for admission to the bar. See *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96 (1963). In the area of juvenile proceedings the arguments that a juvenile has a right "not to liberty but to custody," that proceedings are "civil" rather than "criminal", and that the proceedings are non-adversary were advanced in order to justify elimination of the right to counsel. Although the constitutionality of the juvenile court laws had been upheld in over 40 jurisdictions, nevertheless the Supreme Court rejected these justifications. *In re Gault, supra.* When the reasoning of the Gault case was advanced in the selective service context, one court of appeals cited two pre-*Gault* court of appeals cases and one 1911 Supreme Court case dealing with abridgment of freedom to con-

tract to hold "it is well settled that there is no Constitutional right to counsel in administrative proceedings under the Selective Service Act." *United States* v. *Dicks*, *supra*. The court so decided despite the fact that the vague standards, burdensome volume, and restricted review in the Selective Service System cases lend themselves to precisely the same kind of abuse which Dean Pound in 1937 found should be surrounded by more formal procedural safeguards and the Supreme Court in 1967 held required the right to counsel. *Gault*, *supra* at 18-19. See also Report of the National Advisory Commission on Selective Service.[3] It has even been held that in small claims proceedings which are clearly "civil" and may even be classified as "de minimus" [*sic*], the right to have counsel make a meaningful appearance somewhere in the proceedings cannot be withdrawn. *Mendoza* v. *Small Claims Court*, 49 C.2d 668, 321 P.2d 9 (1958); *Prudential Ins. Co.* v. *Small Claims Court*, 76 C.A. 2d 379, 173 P.2d 38 (1946).

Cases such as *In re Groban*, 352 U.S. 330 (1957) (5-to-4 decision) and *Madera* v. *Board of Educ.*, 386 F.2d 778 (2nd Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968), do not compel a different result. In the *Groban* case it was held that a witness was not entitled to be assisted by retained counsel when giving testimony before a Fire Marshal. In *Madera* a parent and child were denied permission to be represented by counsel at a guidance conference involving their child pursuant to a Board of Education Regulation. If a person is not entitled to be represented by counsel before a Fire Marshal, before a Grand Jury or before guidance counselors, it is because these proceedings are preliminary in nature and in no way result in a final adjudication. *Madera*, *supra* at 788; *In re Groban*, *supra* at 334. If a charge imperiling an individual's liberty were to arise from one of these hearings, a trial would ensue at which the government would have the burden of proof, and the defendant, with the aid of counsel, could attack the substance of any conclusions tentatively reached at the preliminary hear-

[3] Government Printing Office (1967).

ing which resulted in the charge. The *Madera* court's reliance on the failure of the court in *Dixon* v. *Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961) to add right to counsel to its outline of a fair proceeding prior to suspension of a student is misplaced, since the plaintiffs in their pleadings did not request the right to counsel. *Dixon, supra* at 151, n.1. Furthermore, to the extent that the *Madera* case relies on Selective Service cases for authority it is for present purposes circular.

In contrast to the preliminary nature of the above proceedings, a registrant's personal appearance before his local board is in every sense an adjudication at which the registrant should be awarded traditional judicial safeguards. See *Hannah* v. *Larche*, 363 U.S. 420 (1960). In 50 U.S.C.A. App. § 460(b)(3) Congress has substantially insulated the factual determinations of local and appeal boards. Review of such determinations in a hearing at which counsel is present is restricted to habeas corpus after, or criminal prosecution for refusal of, induction. The scope of review is limited to the question whether there was any "basis in fact" for the classification assigned. While judicial review is thus substantially restricted, the decision of the local board obviously has a dramatic impact on the registrant's life and liberty.

It is contended that since a conscientious objector hearing is an inquiry into the registrant's state of mind, the presence of counsel would not only be of no assistance but, because of the probability that he would make vexatious objections to questions and testimony, counsel's presence would be to the registrant's disadvantage. It is unrealistic to assume that an attorney who is familiar with the very limited scope of judicial review available would do anything which would antagonize a local board or leave it with an impression other than one of complete candor. Also, the registrant will be more able to present his case if he is articulately represented by counsel.

Counsel will also act as a deterrent to possible abrupt or summary treatment of the registrant's claim (*Cf.*, *United States* v. *Wade*, 388 U.S. 218 (1967)). He may also bridge potential hostilities which result from the difference in ages between the board members (who are

between 30 and 75 years old, 32 C.F.R. § 1604.52(c), (d)) and the registrant. Through questioning or argument, counsel can clear up any inconsistencies or vagaries in the registrant's testimony before the board which, if uncorrected, might lead the board to decide against an otherwise qualified registrant. Counsel would be very familiar with the requisite statutes, regulations, and interpretative cases. The registrant may never have previously been required to articulate his beliefs and he may omit or confuse critical aspects of his beliefs. The presence of counsel would be crucial to leaving the board with a complete portrayal of the registrant's relevant beliefs. Finally, a brief summary by counsel may focus the board's attention on the elements of a conscientious objector claim and relate them to what the registrant has said, pointing out why the registrant should be believed. For a review of some of the difficulties encountered in passing on conscientious objector claims, see *United States* v. *Houghten*, 9th Cir. No. 23,556, June 19, 1969. All of the above roles are ones in which attorneys commonly operate, but with which a registrant is likely to have little familiarity. Of course, a registrant is always free to appear without counsel if he concludes that this would be to his advantage. Finally, a local board is not without power to terminate a hearing which is being unduly extended by counsel.

It could be argued that 32 C.F.R. § 1604.41, providing that "Advisors to registrants may be appointed . . . to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law" supplies such procedural safeguards as to remove from 32 C.F.R. § 1624.1(b) the taint of doubtful constitutionality.[4] This does not follow.

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[4] 32 C.F.R. § 1604.71 provides as follows regarding these advisors (appeal agents):

> (c) Each government appeal agent and associate government appeal agent shall be, whenever possible, a person with legal training and experience.

[Footnote continued on page 41]

Even assuming that the appeal agent would be legally qualified, 32 C.F.R. § 1604.71(c), there is no provision for his appearance before the board except when the board so requests. 32 C.F.R. § 1604.71(d)(2).

Furthermore subsection (d)(5) injects such a conflict of interest[5] into any representation the appeal agent may provide that it is doubtful that he could act for the registrant in the role of an attorney.[6] He certainly cannot claim to represent the best interests of the registrant and still be in compliance with subsection (d)(5).

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[4] [Continued]

(d) It shall be the duty of the government appeal agent . . .

(1) to appeal . . . from any classification of a registrant by the local board which is brought to his attention and, in his opinion, should be reviewed by the appeal board.

(2) To attend such local board meetings as the local board may request him to attend.

(3) To suggest to the local board a reopening of any case where the interests of justice, in his opinion, require such action and to submit to the local board, with such suggestion, the information obtained by his investigation of the case which has caused him to arrive at his decision that the case should be reconsidered. . . .

(5) *To be equally diligent in protecting the interests of the Government and the rights of the registrant in all matters.* [Emphasis added.]

[5] In an August 20, 1968 letter, written at the direction of the Board of Governors of the State Bar of California by Staff Attorney Mary G. Wailes, to all members of the Bar serving as Government Appeal Agents, it was stated: "The Board wishes you to be advised, however, that in its opinion in acting as an appeal agent you may be exercising dual responsibilities that could put you in a position of representing conflicting interests."

[6] "To permit the inroad of a class of legal advisers being used as undisclosed informants for the Federal Government will confirm the suspicion and distrust with which some laymen approach full disclosure of their vital interests to their lawyers . . . . The ill-considered directive of General Hershey, already disavowed by government legal specialists, is clearly improper." *Lawyers Cannot be Informants*, 54 A.B.A.J. 153, 154 (1968).

Accordingly, this Court is loathe to hold that the administrative denial of such a right is either authorized by Congress or is constitutional.

The motion to dismiss is granted.

Dated: Sept. 19, 1969.

/s/ Robert F. Peckham
United States District Judge

[Filed Oct. 17, 1969, C. C. Evensen, Clerk]

CECIL F. POOLE
United States Attorney

COLEMAN BRESEE
Assistant United States Attorney
Attorneys for Appellant

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

Criminal No. 42614

UNITED STATES OF AMERICA, APPELLANT

v.

THOMAS WILLIAM WELLER, APPELLEE

NOTICE OF APPEAL

Notice is hereby given that the United States, plaintiff above, hereby appeals to the Supreme Court of the United States from the Order of the United States District Court for the Northern District of California entered on September 19, 1969, dismissing the captioned Indictment pursuant to defendant's pre-trial motion, said motion and order being made pursuant to Rule 12, Fed. R.Crim.P.

The Government certifies that this appeal is not taken for the purpose of delay and is not frivolous.

Respectfully submitted,

CECIL F. POOLE
United States Attorney

/s/ Coleman Bresee
COLEMAN BRESEE
Assistant United States Attorney

DATED: October 17, 1969.

SUPREME COURT OF THE UNITED STATES

No. 1082, October Term, 1969

UNITED STATES, APPELLANT

v.

THOMAS WILLIAM WELLER

APPEAL from the United States District Court for the Northern District of California.

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits and placed on the summary calendar.

March 23, 1970

JOURNAL ENTRY (March 23, 1970):

APPEALS—JURISDICTION NOTED OR POSTPONED

* * * *

No. 1082. United States, appellant, *v.* Thomas William Weller. Appeal from the United States District Court for the Northern District of California. The motion to remand is denied. Further consideration of the question of jurisdiction in this case postponed to the hearing of the case on the merits and case placed on the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 386110 740

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. ———

UNITED STATES OF AMERICA, APPELLANT

v.

THOMAS WILLIAM WELLER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

MOTION TO REMAND TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

On October 17, 1969, the United States filed in the District Court for the Northern District of California a notice of appeal to this Court from a judgment dismissing an indictment for failure to submit to induction into the Armed Forces in violation of 50 U.S.C. App. 462(a), on the ground that appellee had improperly been denied the right to be represented by counsel before his local Selective Service board. At the time the notice was filed we believed that the decision was appealable directly to this Court

under the "motion in bar" branch of the Criminal Appeals Act (18 U.S.C. 3731). On more extensive consideration, however, we have concluded that the appeal should have been taken to the court of appeals under that part of the Act allowing appeals from a "decision * * * dismissing any indictment" where the basis of the decision is not the "invalidity or construction" of the underlying statute. Accordingly, we move to have the case remanded to the Court of Appeals for the Ninth Circuit.

OPINION BELOW

The opinion of the United States District Court for the Northern District of California (Appendix, *infra*, pp. 11-24) is not yet reported.

STATEMENT

Prior to trial, appellee moved under Rule 12, F.R. Crim.P., to dismiss the indictment on the dual grounds that the Selective Service regulation forbidding counsel to be present before the local board was unconstitutional, and that it was not authorized by the Military Selective Service Act of 1967. The following facts appear from the registrant's Selective Service file, which the district judge considered in connection with the motion to dismiss.

Appellee completed and submitted a form claiming conscientious objector status to his local Selective Service board. The board rejected the claim and classified him I-A. He requested a personal appearance, which was granted. Prior to the scheduled ap-

pearance, appellee wrote a letter to the board asking that his counsel be permitted to be present and advise him before the board. Relying on 32 C.F.R. 1624.1 (b), which provides that "no registrant may be represented before the local board by anyone acting as attorney or legal counsel," the board denied the request. Following the hearing, the local board declined to reopen appellee's classification. After unsuccessfully appealing this classification within the Selective Service System, appellee was ordered to report for and submit to induction. He failed to do so and was indicted under 50 U.S.C. App. 462(a).

On September 19, 1969, the district court granted the motion to dismiss on the ground that the regulation denying counsel in appearances before the local board was not authorized by statute. The court in its opinion did not hold that there was a constitutional right to counsel before the local board. Rather, notwithstanding that the regulation prohibiting representation by counsel has been a part of the Selective Service law since the parent statute was passed in 1940, and that it has been sustained by numerous courts of appeals (see App. 18), the court below held that Congress could not be deemed to have authorized the regulation. Relying upon asserted analogies to *Greene* v. *McElroy*, 360 U.S. 474, and *In re Gault*, 387 U.S. 1, the court found that "explicit action" (App. 14) by Congress, rather than a general delegation of power to prescribe local board procedures, was required to sustain the contention that Congress had empowered the Selective Service System to promulgate the regulation depriving registrants of

the privilege of representation by counsel, and that no such "explicit action" by Congress had been taken.

DISCUSSION

18 U.S.C. 3731 provides, in pertinent part:

> An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.
>
> * * * * *
>
> From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.
>
> An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:
>
> From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.
>
> * * * * *
>
> If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court

> of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance.
>
> * * * * *

Insofar as appeal to this Court is concerned, the Criminal Appeals Act affords two possibilities. The ruling below may be viewed as the granting of a "motion in bar" prior to the defendant's being put in jeopardy, or as a decision dismissing the indictment based upon the construction of the underlying statute. Although the questions are not free from doubt, it is our view, upon reflection and further consideration, that neither of these branches of the Criminal Appeals Act was intended to encompass this case.

1. This Court has never decided the scope of the statutory term "motion in bar." See *United States* v. *Blue*, 384 U.S. 251, 254. Two differing views have been expressed. Mr. Justice Brennan, concurring in *United States* v. *Mersky*, 361 U.S. 431, 441, adopted the broad position that a decision sustaining a motion in bar is any judgment "which will end the cause and exculpate the defendant." Under this view, any ruling—including any decision with respect to regulations under a criminal statute—the effect of which is to preclude future prosecution of the defendant on the same charge would be appealable (if rendered prior to the attachment of jeopardy) *only* to this Court.

Mersky involved a prosecution for violating regulations promulgated in relation to an import statute. Prior to trial the district court dismissed the infor-

mation on the ground that the regulations were not sufficiently clear to justify a criminal prosecution. The United States appealed to the court of appeals, which certified the case to this Court, deeming the appeal to lie here both under the "decision * * * dismissing" and "motion in bar" branches of the Criminal Appeals Act. The majority held that direct appeal was proper under the former branch and did not reach the motion in bar issue. Three Justices (Frankfurter, Harlan, and Stewart, JJ.) dissented, disagreeing with this conclusion and also disagreeing with Mr. Justice Brennan's interpretation of the "motion in bar" provision. Noting that the term had been altered in 1948, without intended change in substance, from its form in the original 1907 statute—*i.e.*, "special plea in bar"—the dissenters argued that the scope of appeals granted under this branch was limited solely to the category of motions included within the common law concept of a special plea in bar. This also was the view of the United States.

As discussed in our brief in *United States* v. *Sisson*, No. 305, this Term, the provisions of the original 1907 Act and its legislative history are the crucial focus for any inquiry as to the scope of the right of appeal to this Court. That legislative history indicates that Congress was using the term "plea in bar" in its common law meaning, or as something different from a demurrer. A sponsor of the 1907 legislation explained that a "special plea in bar is that which is set up as a special defense notwithstanding the defendant may be guilty of the offenses with

which he is charged" (41 Cong. Rec. 2753). Or, as the dissenting opinion in *Mersky* phrased it (361 U.S. at 457):

> The plea in confession and avoidance did not contest the facts alleged in the declaration, but relied on new matter which would deprive those facts of their ordinary legal effect. * * * It set up affirmative defenses which would bar the prosecution.

Examples of motions in bar under this definition include claims of res judicata, statute of limitations, immunity and denial of speedy trial.

This case does have some elements of confession and avoidance, since the defendant by his motion does not deny that he failed to report for induction as ordered, but argues that he cannot be prosecuted therefor because the procedure underlying the order was invalid. Nevertheless, we do not believe that his motion can properly be treated as raising a plea in bar. It is a foundation of any prosecution under Section 462(a) that the order disobeyed must be a valid order. Thus, what defendant raised by his motion was a claim that the indictment did not charge an offense; he was not claiming that although an offense had been committed, he could not for some extraneous reason be prosecuted therefor.

2. The decision of the district court seems to us to be the sustaining of a demurrer based on the indictment as amplified by agreed facts. See *United States* v. *Halseth*, 342 U.S. 277. As such it is clearly appealable under 18 U.S.C. 3731, but the question remains where the appeal lies. The statute provides

for a direct appeal to this Court from a decision dismissing an indictment when the decision is "based upon the invalidity or construction of the statute upon which the indictment * * * is founded." All other decisions sustaining a demurrer to an indictment are appealable to the court of appeals. The specific issue in this case is thus whether the district court's holding—that the indictment must be dismissed because the regulations forbidding counsel to be present on behalf of a registrant before the local board are unauthorized—is "based upon the * * * construction of the statute upon which the indictment * * * is founded." [1]

Again the critical case is *United States* v. *Mersky*, 361 U.S. 431, where the defendant was charged with violating regulations promulgated pursuant to an import statute. There the Court held that the regulations directly amplified the statute in terms of defining the conduct prohibited and that, in these circumstances, a decision construing the regulations was a decision construing the underlying statute. In *United States* v. *Eisdorfer*, No. 330, this Term, arising under the "motion in arrest" branch of the Criminal Appeals Act, we have taken the position that a direct appeal lies to this Court from the district

[1] While the statute, literally read, allows appeals to the court of appeals from any dismissal of an indictment not appealable to this Court, it has been interpreted as not reaching orders based on motions which are not in the nature of a demurrer or plea in abatement. See *United States* v. *Apex Distributing Co.*, 270 F. 2d 747 (C.A. 9) (*en banc*)). That issue is not involved here.

court's ruling granting appellee's motion in arrest on the ground that the delinquency regulations promulgated under the Selective Service laws are invalid for failure to set forth a sufficient standard governing their use. In our view, an indictment charging failure to obey the order to report under 50 U.S.C. App. 462(a) contains an implicit allegation that the order was valid. Construction of the regulations invalidated in *Eisdorfer*, which go directly to the legality of the registrant's classification, thus amounts to a construction of the underlying statute under *Mersky*.

This case is one step removed from the situation in *Eisdorfer*. The regulations here invalidated do not go to a registrant's classification as such, but rather to the process by which the local board determines the classification. Thus, to apply the *Eisdorfer* rationale here it is necessary to argue that the issue of appellee's classification, which goes to the validity of the order to report, is encompassed in the charge of disobedience to the order and that the regulations bearing upon the process by which the local board determined the classification in turn condition the validity of the classification. While the district court was doubtless justified in concluding that the invalidity (in its view) of the process is sufficiently connected with the charge of wilful disobedience to justify dismissal of an indictment under Section 462(a), it is more doubtful that the court's decision can properly be deemed to construe the statute on which the indictment is founded.

In sum, we have come to the conclusion that it would extend the *Mersky* rationale too far to read

the decision below as a construction of 50 U.S.C. App. 462(a), the statute on which the indictment was founded. It follows that the instant case should be remanded to the court of appeals under the explicit procedure set forth in the Criminal Appeals Act governing such situations. Since appellee's motion below clearly constitued an attack upon the sufficiency of the indictment under Rule 12, F.R.Crim.P., the decision below granting the motion and dismissing the indictment is appealable to the court of appeals, provided this Court accepts our submission that it does not come within either of the two branches of the Criminal Appeals Act (discussed *supra*, pp. 5-7), which allow appeal solely to this Court.[2] See *United States* v. *Apex Distributing Co.*, 270 F. 2d 747 (C.A. 9) (*en banc*)).

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1969.

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[2] If the Court is of opinion that this case is, or may be, appealable to this Court, we request that it treat the present Motion to Remand as a Jurisdictional Statement.

APPENDIX

IN THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA

No. 42614

UNITED STATES OF AMERICA, PLAINTIFF

vs.

THOMAS WILLIAM WELLER, DEFENDANT

ORDER GRANTING MOTION TO DISMISS INDICTMENT

The Defendant has made a motion to dismiss the indictment against him pursuant to Fed. R. Crim. P. 12. Defendant contends that his constitutional rights were violated because his request to have his attorney present during the personal appearance on his conscientious objector claim was denied pursuant to 32 C.F.R. § 1624.1(b) which provides:

> . . . no registrant may be represented before the Local Board by anyone acting as attorney or legal counsel.

Alternatively, the defendant contends that the section of 1624.1(b) quoted above is not authorized by the Selective Service Act of 1967, 50 U.S.C.A. App. § 451, et seq.

The pertinent facts, which are apparent from the Defendant's Selective Service file, are as follows: The Defendant requested, received and filed with his local board a Form 150 (Special Form for Conscientious Objector). The board classified the Defendant I-A and the Defendant requested a personal appearance. The Board scheduled the appearance for

November 8, 1967. The Board received a letter from the Defendant's attorney on November 6, 1967 which requested that the board grant Defendant's attorney permission to be present at the personal appearance to advise him with respect to his rights. Relying on 32 C.F.R. § 1624.1(b), the board denied the requested permission. Following the hearing, the Defendant's board declined to reopen his case and retained him in class I-A. The Defendant then unsuccessfully appealed this classification.

There is no question that the hearing before the local board on a registrant's claim for conscientious objector status is a critical stage of an administrative process at which substantial rights are adjudicated. The failure to sustain one's claim can result in requiring a registrant to serve his country in a manner different both in type (a I-A-O serves in the armed services in a non-combatant capacity) and in hazard (a I-O performs non-military alternative service in the national interest).

In *Greene* v. *McElroy*, 360 U.S. 474, (1959), the Supreme Court held that the administrative denial of traditional forms of fair procedure, particularly where substantial constitutional doubts are raised, are not to be presumed to be authorized "by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." The *Greene* case dealt with the administrative withdrawal of security clearance causing the plaintiff's loss of a job in private industry, and the procedural safeguards which were missing were the right to confrontation and cross-examination of those who gave information adverse to Mr. Greene. Certainly, failing to establish a conscientious objector claim is as serious as the impact of loss of the right to have

access to classified information (hardly what most people would consider to be a "right"). The right to counsel is also a traditional safeguard, and the only apparent reason it was not dealt with in *Greene* is because Mr. Greene was represented by counsel in all of his proceedings. Indeed, of what value would be the right to confrontation and cross-examination without the right to counsel skilled in those arts? It seems clear that the affirmative denial of the right to be represented by retained counsel, even in a "civil" proceeding, where substantial loss of liberty may be at stake, is subject to grave constitutional doubts. *In re Gault*, 387 U.S. 1 (1967).

In spite of the fact that the *Greene* court did not decide that the plaintiff had a *constitutional* right to confrontation and cross-examination, the court held that plaintiff had such rights because the "Nation's lawmakers" did not *explicitly* authorize their withdrawal by the Defense Department. Accordingly, in the case at bar, the only "lawmakers" who could explicitly authorize the denial of counsel in hearings before the local draft boards are Congress, not the President, since the President could not raise an army, through induction, without the authority of Congressional legislation.[1] However, nowhere in the

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[1] While under Article 2 § 2 of the Constitution the President is Commander in Chief of the Armed Forces (See *Cafeteria Workers* v. *McElroy*, 367 U.S. 886), under Article 1 § 8, Congress, not the President, (See *Swaim* v. *United States*, 28 Ct. Cl. 173, *Aff.* 165 U.S. 553 (1893); 6 Op. Atty. Gen. 10 (1853)), is given the power to provide for the common defense, to declare war, to raise and support armies, to provide and maintain a navy and to make all laws necessary and proper for the execution of those powers. It is pursuant to these Congressional powers that the Selective Service Act of 1967 was passed, and it was obviously upon the premise that only Congress could raise an army that Congress found it

Act has Congress expressly denied the right to counsel or expressly delegated the power to do so to the President. The only possible sources of such a delegation are Section 1(c) which states that service should be "in accordance with a system of selection which is fair and just. . . .," and section 19(b)(3) which provides "such local boards. . . shall, under rules and regulations prescribed by the President, have the power. . . to hear and determine. . . all questions and claims with respect to. . . exemption . . . ." These sections clearly are not "explicit action by the Nation's lawmakers" (in this case Congress) taking the constitutionally-suspect action of removing the right to be represented by counsel.

In *Greene* the argument was made that delegation of the power pruning the traditional procedural rights should be found because of Congressional and Presidential acquiesence in the program. The court dismissed the contention as follows:*

> If acquiescence or implied ratification were enough to show delegation of authority to take actions within the area of questionable constitutionality, we might agree with respondents that delegation has been shown here. . . . . We deal here with substantial restraints on employment opportunities of numerous persons imposed in a manner which is in conflict with our long-accepted notions of fair procedures. Before we are asked to judge whether, in the context of

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necessary to authorize the President "to select and induct into the Armed Forces of the United States for training and service in the manner provided in this title. . . such number of persons as may be required to provide and maintain the strength of the Armed Forces." 50 U.S.C.A. App. § 454(a).

* 360 U.S. at 506, 507.

> security clearance cases, a person may be deprived of the right to follow his chosen profession without full hearings where accusers may be confronted, it must be made clear that the President or Congress, *within their respective constitutional powers*, specifically has decided that the imposed procedures are necessary and warranted and has authorized their use. . . . Such decisions cannot be assumed by acquiescence or non-action . . . . They must be made explicitly not only to assure that individuals are not deprived of cherished rights under procedures not actually authorized. . . but also because explicit action, especially in areas of doubtful constitutionality, requires careful and purposeful consideration by those responsible for enacting and implementing our laws. Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government are not endowed with authority to decide them. [Emphasis added.]

Greene, therefore, is persuasive authority for the proposition that 32 C.F.R. § 1624.1(b) is not authorized by the statute.

Six years prior to *Greene* the Supreme Court decided *United States* v. *Nugent*, 346 U.S. 1 (1953) (5-to-3 decision). The defendant contended that the requirement of a "hearing" under the then-existing section 6(j) of the Selective Service Act meant that he should be entitled to cross-examine those who gave statements to the F.B.I. deleterious to his claim. The Court denied this claim, feeling that the "6(j) hearing" was not a "determinative" one and that there was "no time" for "litigious interruption." The first

reason is not applicable to our situation because now the hearing before the board is determinative. Reason two is not persuasive and was not followed in *Greene*. If litigious delays of potential members of the armed forces are of concern, *a fortiori* such delays regarding those already in the service are of equal if not greater concern. Yet, counsel participate in hearing with respect to members of the army who claim conscientious objector status. Army Regs. 635-20, para. 4(d) (Jan. 22, 1969). Finally, *Nugent* was not a "right to counsel" case, and the governmental interest in protecting sources of confidential information is more compelling than preventing a possible slight delay caused by the presence of retained counsel at a registrant's personal appearance. Indeed, counsel was permitted to participate in the "6(j) hearings". *Storey* v. *United States*, 370 F.2d 255 (9th Cir. 1966).[2] As Mr. Justice Frankfurter so eloquently stated in his dissent:

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[2] It is interesting to note that following the *Greene* case President Eisenhower, in Executive Order 10,865, set up a security clearance procedure which included the opportunity to be represented by counsel. Exec. Order No. 10,865, 25 Fed. Reg. 1583 (1960), as amended in 3 C.F.R. § 512 (1968). The *Nugent* case was subsequently followed in *Gonzales* v. *U.S.*, 364 U.S. 59 (1960). Petitioner claimed denial of due process because he was denied, at trial, the right to have the Justice Department hearing officer's report, as well as the original report of the F.B.I. The Court rejected this claim, holding that neither was relevant at trial as the case "centered entirely on the Department's recommendation, which petitioner repudiated, but which both the appeal board and the court below found supported by the record." 364 U.S. at 64. Although "following" *Nugent*, the Court concluded that: "This is not to say that there might not be circumstances in a particular case where fairness in the proceeding would require production. *No such circumstances, as foundation for a claim of*

> Considering the traditionally high respect that dissent, and particularly religious dissent, has enjoyed in our view of a free society, this Court ought not to reject a construction of congressional language which assures justice, in cases where the sincerity of another's religious conviction is at stake, and where prison may be the alternative to an abandonment of conscience. *The enemy is not yet so near the gate that we should allow respect for traditions of fairness, which has heretofore prevailed in this country, to be overborne by military exigencies.*

346 U.S. at 12, 13. [Emphasis added.]

The right to counsel has been considered increasingly important in recent years. Indeed, the Supreme Court has held it to be such a fundamental right that even in juvenile proceedings, supposedly non-adversary, the youth has a constitutional right to counsel of his own:

> The juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings, and to ascertain whether he has a defense and to prepare and submit it. The

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actual unfairness, are before us." 364 U.S. at 65. [Emphasis added.] Therefore, the holding in *Gonzales* is not persuasive in deciding the case at bar, because it was based wholly on the Court's conclusion that the facts demonstrated that Gonzales suffered no unfairness due to the denial of production of the documents. The reasoning of the *Greene* court, to the contrary is much like the present case, because the possibility of unfairness to petitioner Greene—certainly no greater than to defendant Weller—led the Court to hold that the denial of traditional safeguards was not to be inferred, but rather required explicit authorization.

> child 'requires the guiding hand of counsel at every step in the proceedings against him.'
>
> *In re Gault, supra.*, at 36. [Citations omitted.]

Even though the right to counsel has been so considered, lower federal courts have consistently taken the position that there is no right to be represented by retained counsel at Selective Service hearings. *Nickerson* v. *United States*, 391 F.2d 760 (10th Cir.), *cert. denied* 392 U.S. 970 (1968); *United States* v. *Dicks*, 392 F.2d 524 (4th Cir. 1968); *United States* v. *Capson*, 347 F.2d 959 (10th Cir. (1965)); *Tantash* v. *United States*, 409 Fed. 2d 227 (9th Cir. 1969); *Haven* v. *United States*, 403 Fed. 2d 384 (9th Cir. 1968). In most of the cases in which the matter has been raised, the courts have either dismissed it with no discussion, placed their reliance on the fact that the personal appearance of the registrant before the board is not at a criminal proceeding within the ambit of the 6th Amendment, or held that failure to request counsel deprived the registrant of standing to raise the issue. (E.g., *Haven*, *supra.*) In still other cases the Court's language has merely been dictum. See *Tantash*, *supra; Haven*, *supra.* No case cited to the Court by the government or found by this Court has addressed itself to the apparent lack of specific authorization in the Selective Service Act for the denial of counsel before the local boards.

The often-abbreviated and sometimes-cryptic treatment of this traditional procedural safeguard has persisted in spite of the many significant procedural developments in other areas of the law. While conscientious objector status may be a "privilege" and not a "right" (See *Uffelman* v. *United States*, 230 F.2d 297 (9th Cir. 1956)), it is now established that

the government may not distribute its largesse in a manner which ignores traditional procedural safeguards. Although the issuance of a liquor license would hardly be considered by most a "right", nevertheless an applicant for a liquor license has far more procedural rights than a Selective Service registrant whose life may ultimately be placed in jeopardy. See *Hornsby* v. *Allen*, 326 F.2d 605 (5th Cir. 1964). Likewise a welfare recipient has more procedural rights than a Selective Service registrant, see *Kelly* v. *Wyman*, 294 F.Supp. 893 (S.D. N.Y. 1968) (three judge court), as does an applicant for admission to the bar. See *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96 (1963). In the area of juvenile proceedings the arguments that a juvenile has a right "not to liberty but to custody," that proceedings are "civil" rather than "criminal", and that the proceedings are non-adversary were advanced in order to justify elimination of the right to counsel. Although the constitutionality of the juvenile court laws had been upheld in over 40 jurisdictions, nevertheless the Supreme Court rejected these justifications. *In re Gault, supra.* When the reasoning of the Gault case was advanced in the selective service context, one court of appeals cited two pre-*Gault* court of appeals cases and one 1911 Supreme Court case dealing with abridgment of freedom to contract to hold "it is well settled that there is no Constitutional right to counsel in administrative proceedings under the Selective Service Act." *United States* v. *Dicks, supra.* The court so decided despite the fact that the vague standards, burdensome volume, and restricted review in the Selective Service System cases lend themselves to precisely the same kind of abuse which Dean Pound in 1937 found should be surrounded by more formal procedural safeguards

and the Supreme Court in 1967 held required the right to counsel. *Gault, supra* at 18-19. See also Report of the National Advisory Commission on Selective Service.[4] It has even been held that in small claims proceedings which are clearly "civil" and may even be classified as "de minimus", the right to have counsel make a meaningful appearance somewhere in the proceedings cannot be withdrawn. *Mendoza* v. *Small Claims Court*, 49 C.2d 668, 321 P.2d 9 (1958); *Prudential Ins. Co.* v. *Small Claims Court*, 76 C.A. 2d 379, 173 P.2d 38 (1946).

Cases such as *In re Groban*, 352 U.S. 330 (1957) (5-to-4 decision) and *Madera* v. *Board of Educ.*, 386 F.2d 778 (2nd Cir. 1967); *cert. denied*, 390 U.S. 1028 (1968), do not compel a different result. In the *Groban* case it was held that a witness was not entitled to be assisted by retained counsel when giving testimony before a Fire Marshal. In *Madera* a parent and child were denied permission to be represented by counsel at a guidance conference involving their child pursuant to a Board of Education Regulation. If a person is not entitled to be represented by counsel before a Fire Marshal, before a Grand Jury or before guidance counselors, it is because these proceedings are preliminary in nature and in no way result in a final adjudication. *Madera, supra* at 788; *In re Groban, supra* at 334. If a charge imperiling an individual's liberty were to arise from one of these hearings, a trial would ensue at which the government would have the burden of proof, and the defendant, with the aid of counsel, could attack the substance of any conclusions tentatively reached at the preliminary hearing which resulted in the

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[4] Government Printing Office (1967).

charge. The *Madera* court's reliance on the failure of the court in *Dixon* v. *Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961) to add right to counsel to its outline of a fair proceeding prior to suspension of a student is misplaced, since the plaintiffs in their pleadings did not request the right to counsel. *Dixon, supra* at 151, n.1. Furthermore, to the extent that the *Madera* case relies on Selective Service cases for authority it is for present purposes circular.

In contrast to the preliminary nature of the above proceedings, a registrant's personal appearance before his local board is in every sense an adjudication at which the registrant should be awarded traditional judicial safeguards. See *Hannah* v. *Larche*, 363 U.S. 420 (1960). In 50 U.S.C.A. App. § 460(b)(3) Congress has substantially insulated the factual determinations of local and appeal boards. Review of such determinations in a hearing at which counsel is present is restricted to habeas corpus after, or criminal prosecution for refusal of, induction. The scope of review is limited to the question whether there was any "basis in fact" for the classification assigned. While judicial review is thus substantially restricted, the decision of the local board obviously has a dramatic impact on the registrant's life and liberty.

It is contended that since a conscientious objector hearing is an inquiry into the registrant's state of mind, the presence of counsel would not only be of no assistance but, because of the probability that he would make vexatious objections to questions and testimony, counsel's presence would be to the registrant's disadvantage. It is unrealistic to assume that an attorney who is familiar with the very limited scope of judicial review available would do anything which would antagonize a local board or leave it with an impression other than one of complete candor.

Also, the registrant will be more able to present his case if he is articulately represented by counsel.

Counsel will also act as a deterrent to possible abrupt or summary treatment of the registrant's claim (*Cf.*, *United States* v. *Wade*, 388 U.S. 218 (1967)). He may also bridge potential hostilities which result from the difference in ages between the board members (who are between 30 and 75 years old, 32 C.F.R. § 1604.52(c), (d)) and the registrant. Through questioning or argument, counsel can clear up any inconsistencies or vagaries in the registrant's testimony before the board which, if uncorrected, might lead the board to decide against an otherwise qualified registrant. Counsel would be very familiar with the requisite statutes, regulations, and interpretative cases. The registrant may never have previously been required to articulate his beliefs and he may omit or confuse critical aspects of his beliefs. The presence of counsel would be crucial to leaving the board with a complete portrayal of the registrant's relevant beliefs. Finally, a brief summary by counsel may focus the board's attention on the elements of a conscientious objector claim and relate them to what the registrant has said, pointing out why the registrant should be believed. For a review of some of the difficulties encountered in passing on conscientious objector claims, see *United States* v. *Houghten*, 9th Cir. No. 23,556, June 19, 1969. All of the above roles are ones in which attorneys commonly operate, but with which a registrant is likely to have little familiarity. Of course, a registrant is always free to appear without counsel if he concludes that this would be to his advantage. Finally, a local board is not without power to terminate a hearing which is being unduly extended by counsel.

It could be argued that 32 C.F.R. § 1604.41, providing that "Advisors to registrants may be appointed . . . to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law" supplies such procedural safeguards as to remove from 32 C.F.R. § 1624.1(b) the taint of doubtful constitutionality.[4] This does not follow. Even assuming that the appeal agent would be legally qualified, 32 C.F.R. § 1604.71(c), there is no provision for his appearance before the board except when the board so requests. 32 C.F.R. § 1604.71(d)(2).

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[4] 32 C.F.R. § 1604.71 provides as follows regarding these advisors (appeal agents):

> (c) Each government appeal agent and associate government appeal agent shall be, whenever possible, a person with legal training and experience.
>
> (d) It shall be the duty of the government appeal agent. . .
>
> (1) to appeal. . . from any classification of a registrant by the local board which is brought to his attention and, in his opinion, should be reviewed by the appeal board.
>
> (2) To attend such local board meetings as the local board may request him to attend.
>
> (3) To suggest to the local board a reopening of any case where the interests of justice, in his opinion, require such action and to submit to the local board, with such suggestion, the information obtained by his investigation of the case which has caused him to arrive at his decision that the case should be reconsidered. . . . .
>
> (5) *To be equally diligent in protecting the interests of the Government and the rights of the registrant in all matters.* [Emphasis added.]

Furthermore subsection (d)(5) injects such a conflict of interest [5] into any representation the appeal agent may provide that it is doubtful that he could act for the registrant in the role of an attorney.[6] He certainly cannot claim to represent the best interests of the registrant and still be in compliance with subsection (d)(5).

Accordingly, this Court is loathe to hold that the administrative denial of such a right is either authorized by Congress or is constitutional.

The motion to dismiss is granted.

Dated:

/s/ ROBERT F. PECKHAM
United States District Judge

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[5] In an August 20, 1968 letter, written at the direction of the Board of Governors of the State Bar of California by Staff Attorney Mary G. Wailes, to all members of the Bar serving as Government Appeal Agents, it was stated: "The Board wishes you to be advised, however, that in its opinion in acting as an appeal agent you may be exercising dual responsibilities that could put you in a position of representing conflicting interests."

[6] "To permit the inroad of a class of legal advisers being used as undisclosed informants for the Federal Government will confirm the suspicion and distrust with which some laymen approach full disclosure of their vital interests to their lawyers . . . . The ill-considered directive of General Hershey, already disavowed by government legal specialists, is clearly improper." *Lawyers Cannot be Informants*, 54 A.B.A.J. 153, 154 (1968).

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1969

No. ~~1082~~ 77

UNITED STATES OF AMERICA,
Appellant,
vs.
THOMAS WILLIAM WELLER,
Appellee.

Appeal from the United States District Court for the Northern District of California

OPPOSITION TO ~~APPELLEE'S~~ MOTION TO REMAND TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

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In the Supreme Court
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OCTOBER TERM, 1969

No. 1082

UNITED STATES OF AMERICA,
Appellant,

vs.

THOMAS WILLIAM WELLER,
Appellee.

Appeal from the United States District Court for the Northern District of California

OPPOSITION TO APPELLEE'S MOTION TO REMAND TO THE COURT OF APPEALS FOR THE NINTH CIRCUIT

On September 19, 1969, the United States District Court for the Northern District of California, entered its order dismissing the indictment against Appellee for failure to submit to induction into the Armed Forces in violation of 50 U.S.C. App. 462(a). On October 17, 1969, the United States filed in the District Court Notice of Appeal to this Court pursuant to 18 U.S.C. 3731. On December 18, 1969, the United

States filed its Application for Extension of Time to Docket Appeal, and on December 22, 1969, that application was granted. It thereafter filed its motion to remand.

OPINION BELOW

The opinion of the Court below is reproduced in full in the Government's Motion to Remand (Appendix, pp. 11-24).*

STATEMENT

Appellee concurs with the summary of the United States with respect to the procedures below. Appellee cannot concur with the Government in its characterization of the decision below as one of statutory construction lacking Constitutional dimensions. The opinion below (App., p. 24) concludes as follows:

> "Accordingly, this Court is loathe to hold that the administrative denial of such a right is either authorized by Congress *or is constitutional.*" (Emphasis added)

In its opinion the District Court analyzed modern constitutional standards of the right to counsel as applied to analogous proceedings, including the rights of juveniles (*In re Gault*, 387 U.S. 1 (1967)), welfare recipients, *Kelly v. Wyman*, 294 F. Supp. 893 (S.D. N.Y. 1968, three judge court), and Law School graduates seeking admission to the Bar, *Willner v. Com-*

*The opinion below will be cited herein as "App., p. ....".

mittee on Character and Fitness, 373 U.S. 96 (1963). The Court then applied that analysis to the situation of a Selective Service registrant seeking conscientious objector status, making a finding that this is a critical adjudicative proceeding which has only the most highly circumscribed subsequent review. (App., p. 21.)

The Government itself points out that the issue presented by this Appeal,

> ". . . is an important and recurring one in the administration of the Selective Service laws, and should ultimately be resolved by this Court." (Application for Extension of Time for Docketing this case, p. 2.)

As a matter of law, this appeal belongs only before this Court. The laudable efforts by the Government, in its legislative proposals and in recent amendments to the Selective Service Regulations to eliminate the confusion, uncertainty and controversy surrounding the administration of the Selective Service Act can only be furthered by speedy and dispositive adjudication of the question presented by this case by this Court.

DISCUSSION

The United States points out in its introduction to the Motion to Remand that at the time it filed the Notice of Appeal to this Court, it believed the decision below was appealable directly to this Court under the "motion in bar" section of 18 U.S.C. 3731. It is manifest that under that view, appeal can lie nowhere else but to this Court. The Government concedes (p.

5) that "the questions are not free from doubts". Appellee has difficulty in seeing the doubt, either under the motion in bar section of the Criminal Appeals Act, or under the statutory construction section.

1. The motion of the Government (p. 5) states: "This Court has never decided the scope of the statutory term "motion in bar". This statement is accurate only in the narrowest sense; the Court has not decided the question of whether an order "ending the cause and exculpating the defendant" which is based entirely on matters appearing on the face of the pleadings is to be considered a motion in bar. It has decided that where the Court below goes beyond the pleadings the ruling is treated as one on a motion in bar. *United States v. Blue,* 384 U.S. 251, 254:

> "Because the dismissal by its own force would 'end the cause and exculpate the defendant,' United States v. Hark, 320 U.S. at 536, 88 L. ed. at 296, rather than merely abate the prosecution on account of some normally curable defect, one requisite of a motion in bar is met. Whether it is a further requisite that the motion introduce 'new matter' in the fashion of a plea by way of confession and avoidance need not here be decided. See United States v. Mersky, 361 U.S. 431, 441, 453, 4 L. ed. 2d 423, 431, 437, 80 S. Ct. 459 (separate opinions disagreeing on this point). For *in this instance Blue unquestionably relied on new matter* in alleging self-incrimination, so the motion qualifies even under the more stringent definition. Thus under either view of a motion in bar taken in Mersky, this case qualifies for direct review." (Emphasis added.)

That the quoted language could be written in the present case is clear. The entire Selective Service file of the Appellee was admitted into evidence and considered by the Court below. (See App., p. 11.) The opinion of the Court (App., p. 12) as well as the record of hearing on the Motion, make it clear that it was of critical importance to the Court that Appellee had duly applied to his Board for the right to have counsel present at his personal appearance, that such application had been made prior to the hearing, and that such application had been denied by the Board. Thus there can be no doubt whatsoever that the order of the Court below goes far beyond the face of the pleadings, statutes and regulations involved. As in *Blue* (supra), Weller "unquestionably relied on new matter . . ."

There is, of course, no doubt that the order below does "end the cause and [does] exculpate the defendant." *U.S. v. Hark* (supra).

The most restrictive view of the "motion in bar" is that it is identical to the common law plea in confession and avoidance (dissent in *U.S. v. Mersky,* 361 U.S. 431, 457):

> "The plea in confession and avoidance did not contest the facts alleged in the declaration, but relied on new matter which would deprive those facts of their ordinary legal effect. * * * It set up affirmative defenses which would bar the prosecution."

By suggesting that the motion below fails to fall within this definition the Government must assert

that the validity of the induction order which was contested by the motion to dismiss was a matter of *fact* and thus that appellant did in fact contest the facts alleged.

The United States has consistently and successfully taken the position that the validity of an induction order is a question of law, and not a question of fact, and that it cannot therefore be submitted to a jury.

The Government cannot expediently change its position on this question for purposes of the present proceeding. The validity of an induction order is a matter of law in a trial, and contesting its validity is not a contest of "fact" for purposes of the motion in bar section of the Criminal Appeals Act.

Quite clearly the position taken by Appellee below was that he "confessed", that he did not submit to induction, and sought to "avoid" that as an act for which he could be prosecuted by "relying on new matter which would deprive those facts of their ordinary legal effect."

Thus, there can be no doubt that even under the minority view in *Mersky* (supra), the decision of the Court below is in the nature of a "motion in bar", and it is quite clear from the opinion of Justice Harlan (who was a member of the *Mersky* minority) in *U.S. v. Blue* (supra), that where disposition of the motion below ended the cause and exculpated the defendant and where the defendant relied on new matter, the motion in bar element of the statute is fully satisfied.

2. In addition to the clear jurisdiction of the Court under the "motion in bar" section of the Criminal Appeals Act, it is also quite clear that the Government's initial position, in filing Notice of Appeal to this Court, that the decision below is based upon "the invalidity or construction of the statute upon which the indictment . . . is founded" is also clear and governing.

In *Mersky* (supra), the acts alleged to be crimes were defined by regulations which were authorized by a general statute. In coming to the conclusion that

> "the construction of one necessarily involves the construction of the other" (361 U.S. at 438), the Court looked to the statutory scheme. It pointed out that, "Here the statute is not complete by itself, since it merely declares the range of its operation and leaves to its progeny [regulations] the means to be utilized in the effectuation of its command." (361 U.S. at 437.)

The present case involves a very similar statutory scheme. Congress authorized the President to

> "select and induct into the Armed Forces of the United States for training and service . . . such number of persons as may be required to provide and maintain the strength of the Armed Forces."
>
> 50 U.S.C. App. 454(a).

It further provided that

> "the selection of persons for training and service . . . shall be made in an impartial manner, under such rules and regulations as the President may prescribe . . ."
>
> 50 U.S.C. App. 455(a)(1).

Thus there can be no question that as in *Mersky,* we are dealing with a statute which is not complete in and of itself, but which authorizes and in fact requires the promulgation of regulations to fill out its scheme. The Court below, in applying the test of *Green v. McElroy,* 350 U.S. 474 (1959), analyzes the statutory and regulatory scheme. (App., p. 12.) The Court first scans the Act to find an express authorization for the denial of the right to counsel (App. pp. 13-14), it then scans the Act to find any express delegation of the power to do so. (App., p. 14.) It finds none in the Act. It then analyzes the Act for possible sources of implicit delegation of such authority. It examines Section 1(c) [50 U.S.C. App. 451(c)] and Section 19(b)(3) [50 U.S.C. App. 460(b)(3)], construing them, and finding that they are clearly "not 'explicit action by the Nation's lawmakers' (in this case Congress) taking the constitutionally-suspect action of removing the right to be represented by counsel." (App., p. 14.) To view this analysis of the Court below as anything other than a construction of the statute, is to bend language beyond reason.

The Government's attempt to distinguish this case from *U.S. v. Eisdorfer,* No. 330, this Term, and from the positions taken therein both by the Government and by the Court, is misleading.

The Government concedes that to apply the *Eisdorfer* rationale here

> ". . . it is necessary to argue that the issue of appellee's classification, which goes to the validity of the order to report, is encompassed in the

> charge of disobedience to the order and that the regulations bearing upon the process by which the local board determined the classification in turn condition the validity of the classification."

Further, they concede (p. 9) that the District Court was justified in dismissing the indictment (once it found that the process leading to the order to report for induction was invalid). Yet they try to suggest that the dismissal was not based on a finding that the induction order was void. They seem to suggest that the decision of the Court below should be read as holding that in some metaphysical sense the order to report for induction was valid, and that nevertheless the registrant could not be prosecuted for willful disobedience of it. Even if this was conceptually valid, it is an analysis which would put the case squarely back in the "confession and avoidance" category as a motion in bar.

SUMMARY

It is undisputed by either party that the question of the jurisdiction of this Court does not depend upon how the pleading below was filed, but on "the effect of the ruling sought to be reviewed". *U.S. v. Hark,* 320 U.S. 531, 536. The analysis presented herein makes it unquestionable that within either the majority or the minority view of the meaning of the term "motion in bar", as used in 18 U.S.C. 3731, the order below was an order sustaining a motion in bar, and further that this was a decision construing a

statute, squarely within the meaning of that term as defined by this Court in *U.S. v. Mersky,* 361 U.S. 431.

It was the Government, not the Appellee which sought appellate review of this matter. The Government is, of course, free to abandon its appeal. However, so long as it pursues it, it is bound by law to the exclusive jurisdiction of this Court. As in *U.S. v. Sisson,* No. 305, this Term, and *U.S. v. Eisdorfer,* No. 330, this Term, a prompt disposition of this matter by this Court would appear in the interest of all parties and of the efficient and fair administration of the Selective Service Act.

Dated, Berkeley, California,
February 27, 1970.

Respectfully submitted,
PETER FRANCK,
Attorney for Appellant.

FRANCK, HILL, STENDER, ZIEGLER & HENDON,
Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 77

UNITED STATES OF AMERICA, APPELLANT

v.

THOMAS WILLIAM WELLER

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the United States District Court for the Northern District of California (A. 31-42)[1] is reported at 309 F. Supp. 50.

JURISDICTION

On September 19, 1969, the district court entered an order granting appellee's motion to dismiss an

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[1] "A." refers to the Appendix in this Court. "R." refers to the original record. "Exh. A." refers to appellee's Selective Service file (Exhibit A to the motion to dismiss the indictment).

indictment charging him with refusal to submit to induction as ordered, in violation of 50 U.S.C. App. 462(a), on the ground that appellee had improperly been denied the right to be represented by counsel at a personal appearance before his local Selective Service board (A. 31-42). A notice of appeal to this Court was filed on October 17, 1969, in the belief that the "motion in bar" branch of the Criminal Appeals Act (18 U.S.C. 3731) was applicable to the district court's order (A. 43). On more extensive consideration, however, the government moved the Court on January 16, 1970, to remand the case to the Court of Appeals for the Ninth Circuit as involving an appeal from a "decision * * * dismissing [an] indictment" *not* predicated upon "invalidity or construction" of the underlying statute; a request was made to have the motion treated as a jurisdictional statement if the Court decided the case was or might be directly appealable (Gov't Motion to Remand, No. 1082, 1969 Term, p. 10, n. 2).

On March 23, 1970, the government's motion was denied and further consideration of the jurisdictional question was postponed to the hearing of the case on the merits (A. 44). In our view, the ruling below should be viewed neither as the granting of a "motion in bar" prior to the defendant's being put in jeopardy, nor as a decision dismissing an indictment based upon the construction of the underlying statute. On this basis, this Court is without jurisdiction to consider the case on direct appeal. Accordingly, the instant case should be remanded to the court of appeals under the explicit procedure set

forth in the Criminal Appeals Act governing such situations (see App. A, *infra*, pp. 55-56).

QUESTIONS PRESENTED

1. Whether this Court has jurisdiction over this direct appeal.

2. Whether the prohibition of 32 C.F.R. 1624.1 (b) on a registrant's being represented by counsel when making a personal appearance before his local Selective Service board is unauthorized by statute or constitutionally invalid as inconsistent with due process.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Criminal Appeals Act (18 U.S.C. 3731), Section 10(b) of the Military Selective Service Act of 1967 (50 U.S.C. App. 460 (b)), and the pertinent Selective Service regulations (32 C.F.R. 1604.41, 1604.71, 1624.1, and 1624.2) are set forth in Appendix A, *infra*, pp. 55-61.

STATEMENT

On January 15, 1969, appellee was charged in a single-count indictment, in the United States District Court for the Northern District of California, with refusing to submit to induction into the Armed Forces, in violation of 50 U.S.C. App. 462(a) (A. 2).

Prior to trial, appellee moved to dismiss the indictment on the ground, *inter alia*, that he had been denied the right to counsel at a personal appearance before his local board (A. 3-4). In a supporting

memorandum (R. 7-28), he asserted that the regulation prohibiting representation by counsel at such appearances (32 C.F.R. 1624.1(b)) was unconstitutional as violative of due process (R. 7-26) and, alternatively, was not authorized by the Military Selective Service Act (R. 23-24).

Appellee's Selective Service file, which the district court considered in ruling on his motion (A. 31), reveals the following pertinent facts:

Appellee registered with Local Board No. 22, Sacramento, California, in 1962 and, following several intermediate classifications, was classified I-A in July 1967 (A. 5-6; Exh. A, p. 2). On August 10, 1967, he filed with the board a completed SSS Form 150 claiming status as a conscientious objector (A. 6; Exh. A, pp. 77-82). The board rejected the claim and again classified him I-A (A. 6; Exh. A, p. 88), whereupon appellee, pursuant to 32 C.F.R. 1624.1 and 1624.2, requested a personal appearance before the board to discuss his classification (A. 6, 9-10). The board scheduled such an appearance for November 8, 1967 (A. 11). On November 6, 1967, appellee's attorney advised the board by letter that appellee desired the attorney to be present at the appearance and requested permission to attend (A. 12-13). Relying on 32 C.F.R. 1624.1(b), the board refused the request (A. 14-15),[2] and, following appellee's per-

[2] The attorney had also requested that appellee be permitted to bring witnesses to the hearing to attest to the sincerity of the C.O. claim and had asked that a stenographer be present to record the proceedings (A. 12). The board advised counsel that appellee should have the persons whom

sonal appearance, retained his I-A classification, declining to reopen the case (A. 7). After unsuccessfully appealing the local board's determination within the Selective Service System, appellee was ordered to report for induction (A. 7, 30). He reported for but refused to submit to induction (A. 8), and this prosecution followed.

The district court found that the proviso of the regulation cited by the local board as the basis for prohibiting representation by counsel at personal appearances was not authorized by statute (A. 31-42). Notwithstanding that this prohibition has been a part of the Selective Service law since the parent statute was passed in 1940, and that it has been sustained by numerous courts of appeals (see A. 36), the court below held that, absent "explicit action" (A. 32, 33) by Congress, a general delegation of power to prescribe local board procedures (as provided in 50 U.S.C. App. 460(b)(1)), was not sufficient to warrant the conclusion that Congress had expressly empowered the President to promulgate the questioned regulation. In so holding, the district court was careful to circumvent deciding directly the constitutional question; however, basic to its determination was an underlying assumption that the regulatory prohibition had a "taint of doubtful constitutionality" (A.

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he desired as witnesses submit their proposed testimony in writing and that any submitted statements would be considered by the board (A. 14). It declined, however, in the exercise of its discretion, to permit stenographic recording of the proceedings (A. 15). The proceedings at the personal appearance were informally recorded and summarized by the chairman (A. 16-17; Exh. A, pp. 98-99).

40). Accordingly, the court below concluded that the "constitutionally-suspect" (A. 33) regulation could not be sustained for want of explicit statutory authorization.

SUMMARY OF ARGUMENT

I

In its order denying appellee's motion to remand the instant case to the Court of Appeals for the Ninth Circuit, this Court postponed further consideration of the jurisdictional question to the hearing of the case on the merits (A. 44). Since that time, this Court has handed down its decision in *United States* v. *Sisson*, No. 305, 1969 Term, discussing at some length the question of direct appeals to this Court under various branches of the Criminal Appeals Act. Although *Sisson* can be distinguished from the present case on the ground that "jeopardy" had there attached, while here the indictment was dismissed prior to trial, in our view the Court's opinion in that case lends support to our position here that a direct appeal from the ruling below does not lie to this Court.

The decision of the district court does not come within the "motion in bar" provision of the Criminal Appeals Act. Both the provisions of the 1907 Act and its legislative history indicate that Congress was using the term "plea in bar" in its common law meaning, or as something different from a demurrer. Here, however, what the defendant raised by his motion was a claim that the indictment did not charge an offense; he was not claiming that although an offense

had been committed he could not for some extraneous reason be prosecuted therefor. Accordingly, we do not believe his motion can properly be treated as raising a plea in bar.

Instead, the decision of the district court seems to us to be the sustaining of a demurrer based on the indictment as amplified by agreed facts. As such, it is clearly appealable under 18 U.S.C. 3731, but, in our view, the appeal lies to the court of appeals. The ruling below is not one predicated directly on a construction of the underlying statute—either 50 U.S.C. App. 462(a) or any substantive provision. Nor does the regulation in question—barring the presence of counsel for registrants before local boards—seem so inextricably intertwined with the underlying statute as to bring the ruling within the rationale enunciated in *United States* v. *Mersky*, 361 U.S. 431.

Since the dismissal of the indictment is not appealable directly to this Court under either the "motion in bar" or "decision * * * dismissing" branches of the Criminal Appeals Act, we submit that the instant case should be remanded to the court of appeals under the explicit procedure set forth in the Act governing such situations. We recognize, however, that this Court has already given a preliminary indication that it can properly entertain a direct appeal from the ruling below. Accordingly, we have proceeded to brief the merits for consideration by this Court in the event it should disagree with our position on the jurisdictional question.

II

The Selective Service regulations, insofar as here relevant, give registrants the right to appear in person before their local boards to discuss, or seek to change, classifications assigned them on the basis of information supplied in their written questionnaires. The regulations provide, however, that "no registrant may be represented before the local board by anyone acting as attorney or legal counsel" (32 C.F.R. 1624.1(b)). This prohibition was issued within the intended scope of authority delegated to the President under the Selective Service Act and has been specifically ratified by Congress after careful and purposeful consideration in both the House and the Senate. Its enforcement, in the context of a nonadversary proceeding before a local board, is not inconsistent with the constitutional requirements of procedural due process.

A. Assuming *arguendo* that the questioned regulation is of doubtful constitutionality, the proper inquiry for disposition of the "authorization" issue is whether Congress, either by direct action or by considered and purposeful inaction, evidenced a specific intent to delegate to the President, under the general enabling language of the Selective Service Act, authority to promulgate a regulatory prohibition against representation by counsel at personal appearances before local boards. By restricting its consideration of this question to a narrow reading of Sections 1(c) and 10(b)(3) of the Act, the district court erroneously disregarded the derivations of the present regulation and ignored the direct attention afforded this

precise prohibition in hearings before the House Armed Services Committee and during debate on the floor of the Senate.

Promulgated by each of two Presidents, initially under the Selective Training and Service Act of 1940 and later under the Selective Service Act of 1948 (recently renamed the Military Selective Service Act of 1967), the regulation prohibiting representation by counsel at local board appearances has been a basic part of the Selective Service law for nearly 30 years. During this time Congress has, on at least four separate occasions, substantially reenacted or broadly revised and amended the basic conscription statute without any alteration or repudiation of the regulatory prohibition.

Moreover, a review of the 1967 Act and its legislative history demonstrates that the regulation was discussed at length during consideration of the most recent amendments to the Selective Service laws. Thus, in hearings before the House Armed Services Committee in 1966, the questioned prohibition came under direct attack and was afforded special attention by General Hershey in his reply before the Committee to critics of the Selective Service System. This precise focus notwithstanding, the Committee reported out the bill which was to become the 1967 statute without proposing any amendment affecting the prohibition; nor was any change in this regard offered during proceedings before the House. When the bill came before the Senate, the regulation was again called into question and a floor amendment was proposed explicitly providing for representation by coun-

sel at personal appearances before the local boards. After extended debate, a vote was taken and the amendment was defeated by a substantial margin.

The 1967 Act in its final form did incorporate an amendment giving statutory recognition for the first time to the office of government appeal agent, which has the function of furnishing legal services both to the registrants and to the local boards. This amendment's legislative history reflects the careful consideration given by Congress to a registrant's need for legal assistance in attempting to alter his draft classification. The affirmative choice to expand the category of lawyers eligible for service as government appeal agents (through elimination of the exclusion of lawyers in Reserve components of the Armed Forces), rather than to rescind the regulation proscribing representation by private counsel, evinces an explicit congressional decision to ratify the challenged procedure.

B. The denial to registrants of representation by counsel at personal appearances before their local draft boards is not inconsistent with procedural due process. Assuming *arguendo* that the Due Process Clause of the Fifth Amendment requires a registrant be afforded the right to appear in person before his local board to protest his draft classification, it does not follow therefrom that the same constitutional considerations mandate that he be permitted representation by counsel at such proceedings. Fundamental distinctions between personal board appearances and conventional adversary proceedings of a judicial or quasi-judicial character have long

been a basis for lower courts' consistent refusals to impose on the former, under the guise of due process, the full panoply of judicial procedures. Indeed, it was in tacit recognition of these basic differences that Congress decided specifically to exempt proceedings under the Selective Service Act from the requirements of the Administrative Procedure Act. The suggestion by the district court that denial to registrants of representation by counsel violates traditional safeguards of procedural due process thus ignores the nature and function of the Selective Service process and erroneously seeks to transform the Selective Service System into an accusatorial or prosecutorial agency.

Since a personal board appearance is in fact a nonadversary proceeding, a determination as to whether the elusive and variable concept of "due process" precludes the denial of representation by counsel at such proceeding depends on the careful balancing of a complex of factors. Private interests of registrants must be weighed carefully against the public need for a Selective Service System with the capacity to provide necessary manpower for the Armed Forces of the United States in a speedy and efficient manner. In this context, it is relevant to consider not only the possible advantages to registrants but also the formidable questions raised by the district court's suggestion that personal board appearances be transformed into trial-like proceedings—*e.g.*, representation of local boards as well by counsel; appointment of counsel for indigent registrants where necessary; existence of a correlative right to subpoena, confront and cross-examine adverse witnesses; steno-

graphic recording of all board proceedings; statement of reasons for an assigned classification by local boards. Even apart from these considerations, the resultant burdens that representation by counsel would predictably impose on the speedy and effective administration of the Selective Service System, and especially on local boards ill-equipped to deal with such a development, outweigh the marginal gains to registrants, particularly when the non-judicial nature of personal appearances and the legal advice and assistance already otherwise available to registrants contesting their classifications are considered.

No decision of this Court supports the proposition that there exists a Fifth Amendment right to counsel at personal board appearances. *In re Gault*, 387 U.S. 1, which held due process required that a juvenile charged with delinquent behavior be afforded the right to be represented by counsel at juvenile proceedings, clearly cannot be read so broadly. There the Court was most careful to predicate its decision on the fact that the juvenile proceeding was accusatorial in nature and presented the awesome prospect of incarceration of delinquents. Similarly, *Goldberg* v. *Kelly*, 397 U.S. 254, is inapposite. In that case the holding was that due process entitled welfare recipients to an *evidentiary hearing*, including the right to confront and cross-examine adverse witnesses and be represented by retained counsel, prior to termination of their assistance payments. The conventional adversary proceeding contemplated by the *Goldberg* decision is wholly unlike the proceeding under the Selective Service Act. Decisions more nearly in point,

and supporting the view urged here by the government, are *United States* v. *Nugent*, 346 U.S. 1, *In re Groban*, 352 U.S. 330, and *Anonymous* v. *Baker*, 360 U.S. 287.

ARGUMENT

I. This Court Is Without Jurisdiction to Entertain a Direct Appeal and Should Transfer This Case to the Court of Appeals for the Ninth Circuit.

In our earlier motion to transfer this case to the Court of Appeals for the Ninth Circuit, we argued that this Court lacked jurisdiction to entertain a direct appeal since the ruling below could neither be properly considered as the granting of a "motion in bar" prior to defendant's being put in jeopardy nor as a decision dismissing the indictment based on a construction of the underlying statute. On March 23, 1970, our motion was denied; however, the Court postponed further consideration of the jurisdictional question to the hearing of the case on the merits. Subsequent to that determination, the Court decided, solely on jurisdictional grounds, *United States* v. *Sisson*, No. 305, 1969 Term, decided June 29, 1970, and had occasion in that case to examine at some length the question of direct appeals under the various branches of the Criminal Appeals Act. Although *Sisson* is clearly distinguishable from the instant case on the ground that there "jeopardy" had attached, while here the indictment was dismissed prior to trial, it is our view that the opinion in *Sisson* lends support to our earlier submission, renewed here, that a direct appeal from the ruling below does not lie to this Court.

The motion below—to dismiss the indictment because the regulation prohibiting representation by counsel at personal appearances before local boards is unauthorized or, alternatively, unconstitutional—does not, as we see it, come within the intended scope of the statutory term "motion in bar." While this Court has "not settled on a general approach to be taken in interpreting [the motion in bar] provision" (*United States* v. *Sisson*, *supra*, slip. op., pp. 30-31),[3] there seems to be little dispute that both the parent 1907 Act and its legislative history indicate Congress was using the term "plea in bar" as that term was used at common law. Thus, a sponsor of the 1907 legislation explained that a "special plea in bar is that which is set up as a special defense notwithstanding the defendant may be guilty of the offenses with which he is charged" (Senator Patter-

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[3] Cf. *United States* v. *Mersky*, 361 U.S. 431. While the Court did not reach the motion in bar issue, Mr. Justice Brennan, concurring, adopted the broad position that a decision sustaining a motion in bar is any judgment "which will end the cause and exculpate the defendant" (*id.* at 441). Justices Frankfurter, Harlan and Stewart, dissenting, argued that the scope of appeals granted under this branch was limited solely to the category of motions included within the common law concept of a special plea in bar (*id.* at 455-458). See generally *United States* v. *Sisson*, *supra*, slip op., pp. 30-31, nn. 53, 54. See also *United States* v. *Fix*, No. 25,216, decided July 1, 1970, where the Court of Appeals for the Ninth Circuit certified to this Court an appeal from a dismissal of an indictment brought under 50 U.S.C. App. 462 (a), concluding the motion in the district court was within the "motion in bar" provision of the Criminal Appeals Act on the basis of a broad reading of the decision in *United States* v. *Blue*, 384 U.S. 251.

son, 41 Cong. Rec. 2753). Or, as the dissenting opinion in *Mersky* phrased it (361 U.S. at 457):

> The plea in confession and avoidance did not contest the facts alleged in the declaration, but relied on new matter which would deprive those facts of their ordinary legal effect. * * * It set up affirmative defenses which would bar the prosecution.

Examples of motions in bar under this definition include claims of *res judicata*, statute of limitations, immunity and denial of speedy trial.

While the Court in *Sisson* did not reach the question whether the term "motion in bar" should be so restricted, it did state that "[b]ecause the Criminal Appeals Act * * * has descended unchanged in substance from the original Criminal Appeals Act * * * the crucial focus * * * must be the legislative history of the 1907 Act" (*United States* v. *Sisson, supra*, slip op., pp. 23-24). That this led the Court to construe the statute strictly was shown in its discussion of a different aspect of the statutory provision here under consideration, when it said (pp. 34-35):

> The language of the motion-in-bar provision itself limits appeals to those granted "when the defendant has not been put in jeopardy." *We read that limitation to mean exactly what it says* * * * [emphasis added].

The often expressed policy of this Court to "construe the Criminal Appeals Act as confining the Government's right to appeal" (*United States* v. *Sisson, supra*, slip op., p. 33; cf. *United States* v. *Borden Co.*, 308 U.S. 188, 192), was of major influence in the

Sisson decision and points toward the statutory construction we propose here. It is true that this case does have some elements of confession and avoidance, since the defendant by his motion does not deny that he failed to report for induction as ordered, but argues that he cannot be prosecuted because the procedure underlying the order was invalid. Nevertheless, we do not believe that his motion can properly be treated as raising a plea in bar. It is a foundation of any prosecution under Section 12(a) that the order disobeyed must be a valid order. Thus, what the defendant raised by his motion was a claim that the facts which would be shown on a trial of the indictment would not constitute an offense; he was not claiming that although an offense had been committed, he could not for some extraneous reason be prosecuted for it (A. 3).

In this light, the decision of the district court is more analogous to the sustaining of a demurrer based on the indictment as amplified by agreed facts[4]—a so-called "speaking demurrer." As such, it is clearly appealable under 18 U.S.C. 3731, but the question remains where the appeal lies. The statute provides for a direct appeal to this Court from a decision dismissing an indictment when the decision is "based upon the invalidity or construction

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[4] In *Sisson*, the Court noted by way of dictum that it "has never held that an appeal lies from a decision which depends not upon the sufficiency of the indictment alone, but also on a stipulation of the parties" (slip op., p. 16). Thus, it may well be that we need go no further in demonstrating that the Court is here without jurisdiction to entertain a direct appeal. But see *United States* v. *Halseth*, 342 U.S. 277; *United States* v. *Lem Hoy*, 330 U.S. 724, 725.

of the statute upon which the indictment * * * is founded." All other district court decisions in effect sustaining a demurrer to an indictment are appealable to the court of appeals.[5] The specific issue in this case then, as stated in our motion to remand, is whether the district court's holding—that the indictment must be dismissed because the regulation forbidding counsel to be present on behalf of a registrant before the local board is unauthorized by the Selective Service Act—is "based upon the * * * construction of the statute upon which the indictment * * * is founded."

Here a "construction of the statute" is ultimately involved in the district court's determination to dismiss, since it found the regulation to be unauthorized. But this situation resulted only from the assertions made in the motion to dismiss. Thus, the decision below is *based* on the regulation and the fact, alleged in the motion to dismiss, that the defendant had been denied counsel before the local board. Without them, there would be no question before the Court.

In *United States* v. *Mersky, supra*, a case charging the defendant with violating regulations promulgated pursuant to an import statute, this Court held that the regulations directly implemented and amplified the statute in terms of defining the conduct prohibited

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[5] While the statute, literally read, allows appeals to the court of appeals from any dismissal of an indictment not appealable to this Court, it has been interpreted as not reaching orders based on motions which are not in the nature of a demurrer or plea in abatement. See *United States* v. *Apex Distributing Co.*, 270 F.2d 747 (C.A. 9) (*en banc*). That issue is not involved here.

and that, in these circumstances, a decision construing the regulations was a decision construing the underlying statute. In other words, where the statute and regulation are so "inextricably intertwined" that interpretation or invalidation of the regulation necessarily involves a construction of the statute, a direct appeal is proper. Applying the *Mersky* rationale in *United States* v. *Eisdorfer*, No. 330, 1969 Term, appeal dismissed, 396 U.S. 1066, arising under the "motion in arrest" branch of the Criminal Appeals Act, we took the position that a direct appeal could be taken to this Court from the district court's decision granting the appellee's motion where the ruling below was premised on the invalidity of the delinquency regulations promulgated under the Selective Service Act because they failed to set forth a sufficient standard governing their use. In our view, an indictment charging failure to obey an order to report for induction in violation of 50 U.S.C. App. 462(a) contains an implicit allegation that the order was valid. Interpretation of the regulation invalidated in *Eisdorfer*, which went directly to the legality of the registrant's classification there, thus amounted to a construction of the underlying statute within the meaning of *Mersky*.

This case is one step removed from the situation in *Eisdorfer*. The regulation here invalidated does not go to a registrant's classification as such, but rather to the process by which the local board determines the classification. Accordingly, to apply the *Eisdorfer* rationale here it is necessary to argue that the issue of the legality of appellee's classification,

which goes to the validity of the order to report, is encompassed in the charge of disobedience to the order and that the regulation bearing upon the process by which the local board determines the classification in turn conditions the legality of the classification. While the district court was doubtless justified in concluding that the invalidity (in its view) of the process is sufficiently connected with the charge of wilful disobedience to justify dismissal of an indictment under Section 12(a), it is doubtful that the court's decision can properly be deemed to involve a construction of the statute on which the indictment is founded under 18 U.S.C. 3731, as delineated in *Mersky*. Indeed, the whole thrust of *Mersky* is directed toward situations where the statute and regulation are essentially complementary. The Court there referred to the fact that the regulations at issue were "called for by the statute" (361 U.S. 438), and that "the construction of one necessarily involves the construction of the other," since "neither the statute nor the regulations are complete without the other, and only together do they have any force" (*ibid.*). By contrast, the regulations here were invalidated below expressly because it was found to lack statutory authorization, both as to the underlying statute and as to any other substantive provision of the Selective Service Act. While we oppose that holding, it serves to point up how far removed the present case is (even assuming, as we do, congressional authorization) from the situation in *Mersky*, where the regulation in issue was substantively so much a part of the statute as to eliminate on its face any

possible question of statutory authorization. Despite the great importance of the regulation to the effective administration of the Selective Service process, it is nonetheless not one that is so specifically and necessarily contemplated by explicit provisions of the Act that, without it, the statute would be incomplete and without force in the *Mersky* sense.

In sum, we adhere to our previous conclusion that it would extend the *Mersky* rationale too far to read the decision below as a construction of 50 U.S.C. App. 462(a), the statute on which the indictment was founded.[6] As we have contended, the statute is involved only because of the regulation and the fact asserted in the motion below that the registrant had not been permitted counsel at his local board appearance. Thus, the judgment below was *based on* the regulation and this additional fact and not on a construction of the underlying statute. It follows that the instant case should be transferred to the court of appeals under the explicit procedure set forth in the Criminal Appeals Act governing such situations. Since appellee's motion below clearly constituted an attack

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[6] In *Sisson* (slip op., p. 11, n. 9), the Court properly recognized that as "a matter of sound construction * * * 'statute upon which the indictment * * * is founded' should be read to include the entire *statute*, and not simply the penalty provisions" (emphasis added), citing *United States* v. *Socony Mobil Oil Co.*, 252 F.2d 420 (C.A. 1), appeal dismissed per stipulation, 356 U.S. 925, and *United States* v. *Mersky*, *supra*. However, any thought that the Court by this statement might have been suggesting the inclusion of procedural regulations, such as the one involved here, as within the scope of the term "statute" is dispelled by its repeated emphasis throughout the opinion on a "strict construction" of the Criminal Appeals Act.

upon the sufficiency of the indictment under Rule 12, F. R. Crim. P., the decision below granting the motion and dismissing the indictment is appealable to the court of appeals, provided this Court accepts our submission that it does not come within either of the two branches of the Criminal Appeals Act which allow appeal solely to this Court. See *United States* v. *Apex Distributing Co.*, 270 F.2d 747 (C.A. 9) *(en banc)*.

Mindful of the fact that this Court has already given a preliminary indication that it may entertain a direct appeal in this case, however, we have proceeded to brief the issues on the merits for consideration by this Court in the event it disagrees with our position on the jurisdictional question.

II. The Selective Service Regulation Prohibiting Representation by Counsel at Personal Appearances before Local Draft Boards Is Authorized by Statute and Is Constitutionally Valid.

The regulation here in question—32 C.F.R. 1624.1 (b)—provides in pertinent part that "no registrant may be represented before the local board by anyone acting as attorney or legal counsel." The district court, professing doubts as to the constitutionality of this regulatory prohibition, held that it could not stand in the absence of explicit statutory authorization. Concluding that presidential power to promulgate such a regulation derives solely from congressional legislation, and not from any implied constitutional powers the President might possess as Commander-in-Chief of the Armed Forces (A. 33), the court below rested its decision simply on a reading of

the general enabling provisions of the Selective Service Act. Even assuming that Congress alone can authorize denial of counsel in local board proceedings,[7] we think the conclusion reached by the district court is contrary to the clearly manifested legislative intent on this matter. In addition, the decision below ignores the implicit holding of every court that has heretofore had occasion to consider the challenged regulation. Finally, we submit, the regulation is not inconsistent with the requirements of procedural due process under the Fifth Amendment.

A. *The regulation has been specifically authorized by Congress.*

Before considering the correctness of the district court's suggestion that the regulation is of doubtful constitutionality, the initial question for the Court is whether Congress has made an explicit decision that the denial of counsel at personal board appearances is necessary and warranted and has thus authorized this procedure either by direct action or by careful and purposeful inaction. *Greene* v. *McElroy*, 360 U.S. 474, 506-507. The court below, in disposing of this

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[7] In so assuming, the government does not intend to concede that the President is without power to promulgate the challenged regulation under Art. II, Sec. 2, of the Constitution. On numerous occasions, however, this Court has indicated that questions involving allocations of power by the Constitution between the executive and legislative branches of government, particularly as to matters involving war, the national defense and the Armed Forces, present non-justiciable controversies of a political nature that should not properly be brought before the Court. Cf. *Mora* v. *McNamara*, 389 U.S. 934.

issue merely by quoting the general statutory provisions empowering the President to devise rules and regulations necessary to effectuate the policies of the Selective Service Act (50 U.S.C. App. 460(b)(1), 460(b)(3)), unduly restricted the proper scope of judicial inquiry. An "explicit congressional decision" should not be considered any less explicit because reflected in a statute's legislative history rather than embodied in its precise language. Cf. *Hannah* v. *Larche*, 363 U.S. 420, 438.

1. The provision against representation by counsel at local board appearances first appeared in its present form on August 20, 1948, in Executive Order 9988, promulgated by President Truman under the Selective Service Act of 1948.[8] It finds its genesis, however, in an earlier executive order, issued by President Roosevelt on October 4, 1940 under the parent Selective Training and Service Act,[9] which remained in effect throughout World War II. Thus,

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[8] See 32 C.F.R. 624.1(b) (13 Fed. Reg. 4851, 4859); the regulation was redesignated "1624.1(b)" in 1949 (14 Fed. Reg. 5021).

[9] As promulgated by President Roosevelt, the regulation read: "At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for this purpose. If the registrant does not speak English adequately, he may appear with a person to act as interpreter for him. *No registrant may be represented before the local board by an attorney*" (emphasis added) (Selective Service Regulation 369(a) (32 C.F.R. (1940 Supp.) 603.369(a)), promulgated by Exec. Ord. No. 8560 of October 4, 1940 (5 Fed. Reg. 3923, 3932)). The regulation was amended in a respect not here pertinent, and redesignated "625.2(a)", in 1941 (6 Fed. Reg. 6843) (see 32 C.F.R. (1941 Supp.) 625.2(a)).

the questioned regulation has been an explicit part of the Selective Service laws for almost 30 years. In that time Congress has twice reenacted the basic conscription law without substantial change—once in 1946 and again in 1948—and has twice broadly revised and amended it—in 1951 and 1967; [10] but on none of these occasions has it seen fit to change or rescind the challenged proscription of representation by counsel. In failing to consider this background, we think it clear that the court below construed too narrowly the intent of Congress as to the scope of presidential power delegated under the Act's broad enabling provisions.[11] As this Court has often recog-

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[10] The Selective Training and Service Act of 1940 (54 Stat. 885) was reenacted in 1946 except as to certain specified provisions (Act of June 29, 1946, § 1, 60 Stat. 341). The 1946 Act expired by operation of law on March 31, 1947 (§ 7, 60 Stat. 342), but fifteen months later Congress reactivated the draft with the enactment of the Selective Service Act of 1948 on June 24 of that year (62 Stat. 604). In 1951, the 1948 Act was broadly amended and redesignated the Universal Military Training and Service Act (65 Stat. 75). In 1967, the Act was again substantively revised and renamed the Military Selective Service Act of 1967 (81 Stat. 100).

[11] Section 10(b)(1) of the present Act (50 U.S.C. App. 460(b)(1)) empowers the President "to prescribe the necessary rules and regulations to carry out the provisions of" the Act. Section 10(b)(3) vests in local boards the power "under rules and regulations prescribed by the President" to hear and determine claims respecting exemption or deferment from service (50 U.S.C. App. 460(b)(3)). These provisions have been in effect since 1948 (62 Stat. 619, 620). The corresponding (and identically worded) provisions of the 1940 Act were Sections 10(a)(1) and 10(a)(2) (54 Stat. 893, 50 U.S.C. App. (1940 ed.) 310(a)(1) and 310(a)(2)), respectively.

nized, a consistent and long-continued interpretation of a statute (*i.e.*, as authorizing the promulgation of the regulatory procedure here in question) by the office or agency charged with the Act's enforcement is entitled to great weight in determining the correctness of that interpretation or the existence of claimed authorization for action taken pursuant to such interpretation, particularly when Congress has repeatedly reenacted the statute without repudiating the challenged construction or the alleged authority. *Commissioner* v. *Noel Estate*, 380 U.S. 678, 681-682; *Massachusetts Trustees* v. *United States*, 377 U.S. 235, 241-242; *National Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 365-366; *Francis* v. *Southern Pacific Co.*, 333 U.S. 445, 449-450; *Fleming* v. *Mohawk Co.*, 331 U.S. 111, 116; *Billings* v. *Truesdell*, 321 U.S. 542, 552-553; *Morgan* v. *Commissioner*, 309 U.S. 78, 81; *Helvering* v. *Winmill*, 305 U.S. 79, 82-83. Cf. 2 Sutherland, *Statutes and Statutory Construction*, §§ 5107, 5109 (3d ed. 1943).

2. Moreover, evidence of congressional authorization of the prohibition against representation by counsel at local board appearances is not found in repeated reenactment of enabling legislation alone. Rather, examination of the legislative history of the Military Selective Service Act of 1967 reveals that the questioned regulation remained in effect as a result of an "explicit decision" by Congress.

a. During the 1966 hearings before the House Armed Services Committee which led to the 1967 legislation, Representative Melvin R. Laird, on the urging of a Wisconsin attorney, requested the committee

chairman, Representative L. Mendel Rivers, to direct the committee's attention to the regulatory prohibition and consider a recommendation "that draftees be given an opportunity to appear before their local boards with legal counsel of their choice." [12] In response to this suggestion, the committee reviewed extensively the administrative procedures of local boards and of appeal boards and heard statements on both sides of the right to counsel question (House Hearings, pp. 9889-9890, 9920-9922, 9984-9988). A special invitation was extended to General Lewis B. Hershey to respond to critics of the Selective Service System.[13]

In a prepared statement, General Hershey defended, among other things, the specific procedure under attack here as being necessary and warranted in the context of a "simple" proceeding before a "board composed of the young man's neighbors who are generally without legal training and always uncompen-

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[12] *Review of the Administration and Operation of the Selective Service System,* Hearings before the Committee on Armed Services of the House of Representatives, 89th Cong., 2d Sess., June 22, 23, 24, 28, 29 and 30, 1966 (Doc. No. 75) (hereinafter referred to as "House Hearings"), pp. 9889-9890.

[13] Comments of the critics and General Hershey's replies thereto were incorporated in the printed record of the hearings the relevant excerpts from which are appended hereto as Appendix B, and also were reproduced in a printed interim committee report. See generally House Hearings, pp. 9984-9995; *Review of the Administration and Operation of the Selective Service System,* An Interim Report of the Committee on Armed Services of the House of Representatives, 89th Cong., 2d Sess., August 4, 1966 (Doc. No. 76) pp. 10177-10189.

sated" (House Hearings, p. 9987). Pointing out that all registrants had access to legal assistance through recourse to the services of government appeal agents "charged with the duty of being equally diligent in protecting the interests of the Government and the rights of the registrants in all matters," he emphasized the unfairness that would inhere "to the many who cannot afford to hire attorneys if the sons of other families were permitted to have their cases presented by legal counsel" (House Hearings, pp. 9987, 9988). Nor were these observations made in the abstract. Directing the committee's attention to the legislative history of Public Law 89-332, approved November 8, 1965 (79 Stat. 1281), and entitled "An Act To provide for the right of persons to be represented in matters before Federal agencies," [14] General Hershey quoted directly from a 1965 House Judiciary Committee report (House Hearings, p. 9988):

> In this connection the committee wishes to make clear that the bill would not affect the operations of the boards of the Selective Service System. The functions performed under the Universal Military Training and Service Act are expressly excluded from the operation of the Ad-

[14] The Act provided that any person who was a member in good standing of the bar of the highest court of any State or Territory had a right to represent other persons before any agency upon filing a prescribed declaration that he was authorized to represent the person or persons (Sec. 1(a)). The term "agency" as used in the Act was to have the same meaning as it has in the Administrative Procedure Act (Sec. 3). Proceedings under the Selective Service Act are, with an immaterial exception, specifically exempted from the provisions of the Administrative Procedure Act (50 U.S.C. App. 463(b)).

> ministrative Procedure Act, except those relating to public information. Under regulations prescribed by the President a registrant may not be represented before a local board by an attorney. *This is because of the large number of registrants involved, the informality of procedures, and the need for a capacity to provide large numbers of men quickly for service.* The present bill is designed to do away with special agency bars where Congress has given an affirmative right to representation. It does not extend a right of representation to the Selective Service System, where the right does not now exist. [H. Rep. No. 1141, 89th Cong., 1st Sess. p. 5; emphasis added.]

In the face of this direct focus on the regulatory denial of representation by counsel at local board appearances, the House Armed Services Committee, in reporting out the bill which became the 1967 Act (S. 1432, 90th Cong., 1st Sess.), recommended no amendment to the Selective Service law affecting the challenged procedure. In the House debates that followed, moreover, despite specific reference by Representative Robert W. Kastenmeier to the fact that the bill failed to afford registrants a right to counsel or to personal appearance before an *appeal* board,[15] no pertinent

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[15] Representative Kastenmeier criticized the bill in the following terms: "Under present law, the selective service registrant has neither the right of a personal appearance nor the the right to counsel at an appeal hearing. He is, in effect, outside the due process of law which should protect him as an American citizen, and is effectually deprived of rights which are his under constitutional guarantees. The committee bill, however, would make no provision for extending these rights to the registrant" (113 Cong. Rec. 14119). It should be noted

amendment was proposed from the floor or otherwise. In these circumstances, the House's refusal to incorporate into the Selective Service law a statutory right to representation by counsel reflects clearly its explicit determination to continue the procedure prescribed in the questioned regulation.

b. During debate on the bill in the Senate, Senator Wayne Morse offered from the floor an amendment which, in specific terms, would have afforded to each registrant the opportunity to be represented by counsel before his local board.[16] In support of this change, Senator Morse argued that the local boards were "quasi-judicial" bodies possessing "life and death power over" registrants. He contended that adequate legal assistance could not be provided by government appeal agents, since no attorney could be expected to "serve two masters," and asserted that "in no other area of our legal structure is the defendant forced to have the prosecutor as his attorney" (113 Cong. Rec. 12502).

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that, while the right of a personal appearance is not available before an appeal board, such right is available at a hearing before the local board to protest an assigned draft classification. The right to representation by counsel is not afforded in either situation.

[16] The proposed amendment would have inserted in Section 10(b)(3) of the Act (50 U.S.C. App. 460(b)(3)) a new sentence reading: "Each individual shall be afforded the opportunity to appear in person and be represented by counsel before the local board having jurisdiction over him for the purpose of objecting to the classification assigned to him by such board, and to present testimony or other evidence to the local board regarding the classification assigned to him" (113 Cong. Rec. 12502).

In rebuttal, Senator Richard B. Russell, Chairman of the Senate Armed Services Committee and sponsor of the pending bill, emphasized that the personal appearance is an "administrative" and not a "legal" proceeding. He noted, moreover, that registrants "do have a representative"—the "appeals agent provided by law"—commenting incidentally that the pending bill, as reported out, contained "an amendment pertaining to this matter" (see *infra*, pp. 31-33). Senator Russell further observed that there was a "sociological aspect" involved in that the proposed amendment contemplated that the wealthier registrant, who had the means to employ a lawyer, would have an advantage over the poorer one, who might be unable financially to afford an attorney to plead his case.[17] He added that the Judiciary Committee, as recently as 1965, had "considered this matter carefully" in amending the Administrative Procedure Act (see *supra*, pp. 27-28) and "did not provide for an attorney to appear before local boards" [18] (113 Cong. Rec. 12502-12503).

With the issue thus squarely presented, a vote was

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[17] Senator Morse answered this argument by suggesting that the less affluent registrant could secure representation "on a charity basis" if necessary (113 Cong. Rec. 12503).

[18] Senator Russell noted in response to an inquiry by Senator Samuel J. Ervin that a registrant could have an attorney prepare any affidavit or paper to be filed with the local board; however, counsel could not appear to argue the registrant's case. In response to an inquiry by Senator Edward W. Brooke, Senator Russell affirmed that counsel are not permitted to sit beside the registrant during the personal appearance (113 Cong. Rec. 12503).

taken on the Morse amendment and it was defeated 55 to 17 (113 Cong. Rec. 12503-12504). Such an explicit decision by the Senate not to adopt a contrary procedure, premised on a full and careful consideration of objections to the existing regulation, is precisely the sort of direct congressional action found by this Court to be lacking in *Greene* v. *McElroy, supra.*[19] Cf. *Hannah* v. *Larche, supra*, 363 U.S. at 433-439.

c. As finally enacted, the 1967 Selective Service legislation contained the following proviso:

> *Provided,* That no person shall be disqualified from serving as counselor to registrants, including service as Government appeal agent, because of his membership in a Reserve component of the Armed Forces.[20] * * *

This language was added to the basic conscription law for the express purpose of eliminating what Congress believed to be unnecessary impediments on efforts by the Selective Service System to staff the office of government appeal agent (S. Rep. No. 209, 90th Cong. 1st Sess., pp. 5-6; H. Rep. No. 267, 90th Cong. 1st Sess., pp. 7, 46). That office, conceived by

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[19] In *Greene* the sole suggested basis for inferring congressional authorization or ratification of the Defense Department security clearance procedures there involved lay in the "continued appropriation of funds to finance aspects of" the clearance program (360 U.S. at 504). As this Court noted, the appropriation "could not conceivably constitute a ratification of the hearing procedures" in issue because those procedures "were in no way involved in" the program financed by the appropriation (360 U.S. at 505).

[20] Public Law 90-40, approved June 30, 1967, § 1(8), 81 Stat. 104; see 50 U.S.C. App. (Supp. V) 460(b)(3).

presidential regulation as early as 1940,[21] had, prior to 1967, been limited specifically to non-military personnel (see 32 C.F.R. (1967 Rev.) 1604.71(c)), in evident deference to the Act's instructions to establish such "*civilian* local boards, *civilian* appeal boards, and such other *civilian* agencies, including agencies of appeal" (emphasis added) as may be necessary (50 U.S.C. App. 460 (b)(3)). Recognizing that this prohibition was making it "difficult to secure qualified appeal agents" (S. Rep. No. 209, *supra*, p. 5; see also H. Rep. 267, p. 46), considered to be "important to the System" (H. Rep. No. 267, *supra*, p. 46), both the Senate and House Armed Services Committees, in recommending enactment of the quoted proviso, stressed that "appeal agents and advisers to registrants[22] can

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[21] The pertinent regulations were, successively, 32 C.F.R. (1940 Supp.) 601.135, 32 C.F.R. (1941 Supp.) 603.71, and 32 C.F.R. (1949 ed.) 1604.71.

[22] Since 1948 the Director of Selective Service has been authorized to appoint for any local board, upon the recommendation of the State Director, one or more officials (in addition to government appeal agents) known as "advisors to registrants," whose function it is to "advise and assist registrants in the preparation of questionnaires and other selective service forms and * * * on other matters relating to their liabilities under the selective service law" (32 C.F.R. 1604.41). Between 1948 and 1955, each local board was required to have an advisor (32 C.F.R. 604.41, as promulgated by Exec. Ord. No. 9979 of July 20, 1948, 13 Fed. Reg. 4179; 32 C.F.R. (1951 Rev.) 1604.41). Since February 3, 1955, appointment of these officials has been optional (32 C.F.R. 1604.41, as amended by Exec. Ord. No. 10594 of January 31, 1955, 20 Fed. Reg. 735). Under the 1940 Act, three-member boards of lawyers known as "advisory boards for registrants" performed the same functions now performed by the individual advisors (32 C.F.R. (1940 Supp.) 601.145; 32 C.F.R. (1943 Cum. Supp.) 603.41).

be of substantial assistance to * * * [registrants] in providing a full understanding of their rights and responsibilities under the law and in encouraging a full exercise of their procedural rights" [23] (S. Rep. No. 209, *supra*, p. 5; see also H. Rep. No. 267, *supra*, p. 46).

Plainly implicit, therefore, in the enactment by Congress of legislation easing eligibility requirements for appeal agents is its determination to meet, from within the Selective Service System itself, the recognized needs of registrants for legal advice and assistance in contesting assigned draft classifications. Standing alone, we submit, this is satisfactory evidence of congressional ratification of the regulatory prohibition against representation by outside counsel sufficient to warrant reversal of the decision below. Cf. *Hannah* v. *Larche*, *supra*, 363 U.S. at 430-433. When viewed in conjunction with the flat refusals by both the House and Senate to afford registrants a statutory right to representation at local board proceedings when the issue was specifically raised in

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[23] The government appeal agent is required by regulation to appeal on a registrant's behalf from any classification brought to his attention which in his opinion should be reviewed; to attend local board meetings upon the board's request; to suggest reopening where this appears to him to be appropriate; to advise the board as to the law and interpret the regulations for it upon request; and to "be equally diligent in protecting the interests of the Government and the rights of the registrant in all matters" (32 C.F.R. 1604.71(d)), the latter a provision questioned by the court below (see A. 41). An appeal agent must, "whenever possible," be "a person with legal training and experience" (32 C.F.R. 1604.71(c)).

1967, there should be no lingering doubts as to the adequacy of the congressional authorization of the challenged regulation.

It is significant that not even passing mention was made by the district court of this quite persuasive evidence of congressional intent. Had the court below taken this into account, it seems inconceivable that it could have reached the conclusion it did, for a more explicit and contemporaneous indication of Congress' attitude on the question of representation by counsel at personal board appearances is difficult to perceive. Given this legislative history, much of the court's discussion becomes irrelevant, and the decision below, to the extent that it rests on a finding of lack of statutory authorization under the Selective Service Act, as distinguished from constitutional grounds, is erroneous. It is, therefore, to the constitutional argument for invalidation of the regulation at issue, as intimated by the court below (see *supra*, pp. 5-6), that we now turn.

B. *The regulation is not inconsistent with due process.*

As a consequence of its holding that statutory authorization for 32 C.F.R. 1624.1(b) was wanting, the district court found it unnecessary to reach the question of the regulation's constitutional validity and decide specifically that denial of counsel at local board proceedings failed to comport with traditional safeguards of procedural due process. Nevertheless, because the court below suggested that the challenged regulation is of "doubtful constitutionality" (A. 40) in such terms as to evince its view that the provision

is in fact unconstitutional (A. 37-42), it would appear appropriate for the Court also to decide the important constitutional question presented. Postponement of consideration of this issue to a subsequent appeal, taken from what would be the inevitable decision of the district court on a remand, is, we submit, unwarranted. See, *e.g.*, *Mills* v. *Alabama*, 384 U.S. 214, 217.

The constitutional issue arises under the Fifth Amendment—whether denial of counsel in the context of a personal draft board appearance offends those fundamental considerations of fairness that are epitomized in the due process concept. The Sixth Amendment right of "accused" persons, in all "criminal prosecutions," to have "the assistance of counsel for * * * [their] defence"[24] is not in issue here. See *Camp* v. *United States*, 413 F. 2d 419, 421-422 (C.A. 5), certiorari denied, 396 U.S. 968; *McCoy* v. *United States*, 403 F.2d 896, 904 (C.A. 5); *United States* v. *Dicks*, 392 F.2d 524, 528 (C.A. 4); *Nickerson* v. *United States*, 391 F.2d 760, 762 (C.A. 10), certiorari denied, 392 U.S. 907. The Selective Service process is not an accusatorial or prosecutorial one, none of the proceedings is in any respect criminal in character, and the personal board appearance does not involve an adversary process, much less a trial. Moreover, neither appellee nor the district court suggests that the Sixth Amendment has any applicability.

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[24] Cf. *Gideon* v. *Wainwright*, 372 U.S. 335; *Johnson* v. *Zerbst*, 304 U.S. 458; *Powell* v. *Alabama*, 287 U.S. 45.

1. Assuming *arguendo* that due process requires affording to each registrant dissatisfied with his draft classification an opportunity to appear in person before his local board to discuss possible reclassification,[25] it does not necessarily follow that this same constitutional precept guarantees a right to representation by counsel at such appearances. Cf. *Madera* v. *Board of Education*, 386 F.2d 778, 786-787 (C.A. 2), certiorari denied, 390 U.S. 1028. Heretofore, on the few occasions where this Court has held that a right to counsel is required by the Due Process Clause, the decisions have been premised on a finding that the proceedings involved were by nature adversary or accusatorial and of a judicial or quasi-judicial character. *E.g.*, *In re Gault*, 387 U.S. 1; *Goldberg* v. *Kelly*, 397 U.S. 254.

A personal appearance before a local draft board, however, does not fit into this category. See, *e.g.*, *United States* v. *Sturgis*, 342 F.2d 328, 332 (C.A. 3), certiorari denied, 382 U.S. 879. The non-adversary and non-judicial nature of such an appearance has not only been recognized explicitly by Congress, in exempting Selective Service proceedings from the re-

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[25] Since the registrant was granted a personal appearance in this case, we are not faced with the question whether due process requirements may be satisfied by permitting a complaining registrant to contest his draft board classification (before the local board) only on written submissions, without affording him any opportunity for an *oral* hearing. See *Federal Communications Commission* v. *WJR*, 337 U.S. 265, 275-277.

quirements of the Administrative Procedure Act,[26] but also is implicit in the unbroken line of judicial precedents (excepting only, by dictum, the decision below) sustaining the constitutionality of the questioned regulation. See, *e.g.*, *Cassidy* v. *United States*, No. 20,032, decided June 8, 1970 (C.A. 8); *United States* v. *Evans*, No. 24,451, decided April 30, 1970 (C.A. 9); *Camp* v. *United States*, 413 F.2d 419, 421-422 (C.A. 5), certiorari denied, 396 U.S. 968; *United States* v. *Willis*, 409 F.2d 830, 832 (C.A. 5), certiorari denied, 396 U.S. 864; *Chaney* v. *United States*, 406 F.2d 809, 815-816 (C.A. 5), certiorari denied, 396 U.S. 867; *Merritt* v. *United States*, 401 F.2d 768 (C.A. 5); *United States* v. *Dicks*, 392 F.2d 524, 528 (C.A. 4); *Nickerson* v. *United States*, 391 F.2d 760, 762 (C.A. 10), certiorari denied, 392 U.S. 907; *United States* v. *Mientke*, 387 F.2d 1009 (C.A. 7), certiorari denied, 390 U.S. 1011; *Capson* v. *United States*, 376 F.2d 814 (C.A. 10), certiorari denied, 389 U.S. 901; *United States* v. *Capson*, 347 F.2d 959 (C.A. 10), certiorari denied, 382 U.S. 911; *United States* v. *Sturgis*, *supra*; *Peterson* v. *United States*, 173 F.2d 111, 115 (C.A. 6), certiorari denied, 337 U.S. 925; *United States* v. *Mendoza*, 295 F. Supp. 673, 683-684 (E.D.N.Y.); *United States* v. *Heljenek*, 275 F. Supp. 579, 581 (E.D.Pa.); *United States* v. *Kovalchick*, 255 F. Supp. 826, 827 (E.D.Pa.); *United States* v. *Miller*,

[26] The right of a party to appear in person or "by or with counsel" in an agency proceeding is one of the specific *statutory* rights provided by the Administrative Procedure Act (Section 6(a), 60 Stat. 240, as amended, 5 U.S.C. (Supp. V) 555(b)).

143 F. Supp. 712, 718 (N.D.W.Va.), affirmed, 239 F.2d 148 (C.A. 4).[27]

Invested with the responsibility "of classification of the nation's manpower for service in its defense" (*Ex parte Stanziale*, 138 F.2d 312, 314 (C.A. 3), certiorari denied *sub nom. Stanziale* v. *Paullin, Commanding Officer*, 320 U.S. 797), the Selective Service System has been assigned a task which, as noted in *Stanziale* (138 F.2d at 314),

> differs greatly from the ordinary administrative action affecting an individual or a group. It is country-wide in scope, it includes a large portion of the population and obviously its operation must be both smooth and swift if the public object is to be accomplished. * * *

In these circumstances, it is the sole function of the local draft boards to place each resident in the community available for military service within a given class (32 C.F.R. 1622.1), selected largely on the basis of information furnished (in answers to question-

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[27] There are in addition numerous opinions containing dicta to the same effect. See, *e.g.*, *United States* v. *Tantash*, 409 F.2d 227, 228 (C.A. 9), certiorari denied, 395 U.S. 968; *Haven* v. *United States*, 403 F.2d 384, 385 (C.A. 9), certiorari dismissed, 393 U.S. 1114; *Madera* v. *Board of Education, supra*, 386 F.2d at 787; *Imboden* v. *United States*, 194 F.2d 508, 513 (C.A. 6), certiorari denied, 343 U.S. 957; *Niznik* v. *United States*, 173 F.2d 328, 336 (C.A. 6), certiorari denied, 337 U.S. 925; *United States* v. *Pitt*, 144 F.2d 169, 172 (C.A. 3); *Lehr* v. *United States*, 139 F.2d 919, 922 (C.A. 5); *United States* v. *Richmond*, 274 F. Supp. 43, 63 (C.D. Cal.); *United States* v. *Wierzchucki*, 248 F. Supp. 788, 790 (W.D. Wis.); *United States* v. *Schwartz*, 143 F. Supp. 639, 640 (E.D.N.Y.).

naires and in written supporting statements) by the registrant. The local board "is not composed of experts, real or purported, but of citizens of the neighborhood" in which it operates (*Ex parte Stanziale, supra*, 138 F.2d at 314). It does not adjudicate individual responsibility for a registrant's actions. It does not hold trials or determine anyone's civil or criminal liability. It does not issue findings of fact or rule on questions of law. Nor does it indict, punish or impose any legal sanctions. Cf. *Uffelman* v. *United States*, 230 F.2d 297, 303 (C.A. 9). Rather, the only purpose for its existence is to carry out "the sifting and testing process by which individual eligibility, exemption and deferment are determined with [c]ongressional blueprints and enunciated legislative policy" (*United States* v. *Greene*, 220 F.2d 792, 794 (C.A. 7)).

Moreover, the personal appearance afforded registrants by their local boards, once the registrant has been placed in a given class, is not an evidentiary hearing in which witnesses are called, examined and cross-examined, testimony is stenographically recorded and formal findings of fact and conclusions of law are made. *Ex parte Stanziale, supra*, 138 F.2d at 314-315. It is, instead, an informal proceeding providing a registrant with the opportunity to appear alone to do no more than (32 C.F.R. 1624.2)

> discuss his classification * * * [or] present such further information as he believes will assist the local board in determining his proper classification. * * *

These fundamental differences of nature and purpose between the personal appearance, on the one hand, and the conventional adversary proceeding of a judicial or quasi-judicial character, on the other, were not fully appreciated by the court below. By casting the former in the mold of an accusatorial or prosecutorial proceeding, thereby automatically entitled to the full spectrum of "traditional judicial safeguards" (A. 39), it is clear that the district court was guided more by what it felt to be the generally *desirable* result in a right to counsel case (A. 36-38) than by what the Constitution mandates as a requirement of fundamental fairness in the context of the specific type of proceeding under consideration.

2. It has been recognized repeatedly by this Court that the "differing rules of fair play" encompassed by the elusive concept of due process "[vary] according to specific factual contexts * * * [and] differing types of proceedings" (*Hannah* v. *Larche*, *supra*, 363 U.S. at 442). See also *St. Joseph Stock Yards Co.* v. *United States* 298 U.S. 38, 77 (Brandeis, J., concurring). Thus, whether a registrant is entitled as a matter of right to representation by counsel at a local board appearance depends on a careful balancing of the private interests to be served by striking down the questioned regulatory prohibition and the public need for sustaining its constitutionality. Cf. *Cafeteria & Restaurant Workers Union* v. *McElroy*, 367 U.S. 886, 895.

As is apparent from the above summary review of the procedural differences, the reasons most frequently cited for providing an opportunity to have counsel attend a judicial or quasi-judicial proceeding—*i.e.*, so he can prepare and submit a defense, assist his client in confronting his accusers, examine and cross-examine witnesses, make skilled inquiry into the facts, cope with problems of law, insist upon the regularity of procedures and participate meaningfully in the dispositional decision (cf. *In re Gault*, *supra*, 387 U.S. at 36, 38, n. 65)—are not applicable with respect to local board appearances. Nor can it be seriously argued that the presence of counsel is essential to the development of a suitable record for purposes of appeal to the appeal board.[28]

Indeed, the court below did not suggest otherwise. Rather, it focused on the communicative skills of legal counsel as a basis for permitting registrants to be

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[28] While the regulations preclude representation by counsel at the appearance itself, there is no restriction placed on the use of legal services by the registrant in the preparation of Selective Service forms and questionnaires, including any affidavits, written supporting statements and other documentation submitted to the local boards. In addition, counsel may assist in the preparation of the "written summary" of oral information to be given by the registrant at his personal appearance (32 C.F.R. 1624.2(b); see A. 24-27). All written submissions to the local board are placed in the registrant's file, and it is this file alone which is considered by the appeal board in its *de novo* review of the local board classification (32 C.F.R. 1626.24). There is no transcript made of the local board proceedings. It should be added that those unable to afford counsel to assist in the preparation of necessary papers have access to the services of both the government appeal agents and advisors to registrants (see *supra*, pp. 31-33).

represented before their local boards. Thus, in the district court's view, an opportunity should be provided for counsel to attend draft classification discussions so the inarticulate registrant can be "articulately represented"; so counsel can clarify "any inconsistencies or vagaries in the registrant's testimony"; so the local board can be left with a more "complete portrayal of the registrant's relevant beliefs"; and, in the final analysis, so the "elements of a conscientious objector claim" can be related by counsel "to what the registrant has said" and special emphasis can be given to "why the registrant should be believed" (A. 39-40).

At best, such an argument is conjectural. It presupposes an inability on the registrant's part to articulate clearly his own conscientious objection to war [29] and assumes some special ability on the part of counsel to give expression to a registrant's beliefs in a manner more meaningful than the expression of those beliefs by the registrant himself. In both respects, such a view is suspect. Cf. *Madera* v. *Board of Education*, *supra*, 386 F.2d at 788. In any event, even assuming that the presence of counsel might provide a more articulate and meaningful verbal presentation of the registrant's claim, that hardly means that the regulatory denial of an opportunity to be represented at local board proceedings so af-

[29] Since inquiry into a conscientious objector claim goes to the "state of mind" of the registrant, it does not appear unreasonable to presume that the registrant alone is best able to convey to the local board the way he feels, how he arrived at his beliefs and the sincerity of his conviction.

fects the fundamental fairness of the personal appearance as to be inconsistent with the requirements of due process.[30] Moreover, when this conjectural advantage to registrants is properly viewed in the perspective of the consequent burdens imposed thereby on the sole function of the Selective Service process—to provide manpower for the Armed Forces of the United States—any lingering doubts as to the regulation's constitutionality should disappear.

To open the door of local draft board appearances to legal counsel would inevitably have the effect of permitting "precisely the kind of 'litigious interruptions of procedures to provide necessary military manpower' * * * which Congress sought to prevent" in enacting the Selective Service Act. *Clark* v. *Gabriel*, 393 U.S. 256, 258-259. Cf. *Falbo* v. *United States*, 320 U.S. 549, 554; *Estep* v. *United States*, 327 U.S. 114, 137 (Frankfurter, J., concurring); *Oestereich* v. *Selective Service Board*, 393 U.S. 233,

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[30] In this regard, it is relevant to recall that the "oral hearing" afforded a registrant is fully supported by written submissions, including a written summation of oral statements to be made before the local board. To the extent, therefore, that a registrant does have difficulty articulating his claim, any questions remaining in the minds of board members can be answered by reference to the registrant's written responses to Selective Service questionnaires, affidavits, supporting statements (from counsel and others) attesting to the registrant's sincerity, and the written summary (which can be, and in this case presumably was, prepared by counsel). In addition, for purposes of clarification, the board may well call a government appeal agent into the proceeding to assist the registrant in his oral statements and, at the same time, assist the board members in understanding the claim (32 C.F.R. 1604.71(d)(2) and (5)).

241 (Harlan, J., concurring). Discussion of a registrant's classification, or the submission of additional information, could no longer be conducted on an informal basis. Rather, the proceeding, while an administrative one, would be turned into a process of litigating the particular claim to deferment or exemption status.[31] Matters with which the local board would not be equipped to deal, and which would divert it from accomplishing the purpose for which it was established (see, *e.g.*, *Welsh* v. *United States*, No. 76, 1969 Term, decided June 15, 1970; *Mulloy* v. *United States*, No. 655, 1969 Term, decided June 15, 1970), would predictably be interjected by counsel. The delay occasioned by such tactics would be considerable, and could well have such a disruptive effect that the present draft-by-lottery system would be unworkable.[32] In short, the inevitable result might

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[31] While the discussion here has been in the context of a claim to conscientious objector status, the arguments presented apply with equal force where the personal appearance is requested by a claimant to dependency, occupational or student deferment status, or, for that matter, where it is based on any other cognizable claim.

[32] Under the present lottery system of induction, those registrants drawing the higher numbers (perhaps any number over 250) have little chance of being drafted at all during their year of primary exposure. If some of those assigned low numbers in the lottery, however, are able with the assistance of counsel to delay substantially their induction, local boards will be forced to fill their quotas by calling up registrants holding higher numbers who claim no deferment or exemption status, but who by virtue of the draw should not be called ahead of those delaying their induction. Thus, the whole underlying purpose of the draft-by-lottery system is jeopardized.

be little short of the "constructive paralysis of the Selective Service System in the performance of its mission of procurement of manpower for the Department of Defense." [33] In these circumstances, the private interests of registrants in having their deferment or exemption claims "articulated" are relatively less significant when compared with the public need for the orderly, essentially impartial, and speedy processing of men for induction into military service.

Nor should the collateral consequences likely to flow from a decision to confer a right to counsel on those registrants requesting a personal appearance be overlooked. In all probability, the local board members, being for the most part laymen (32 C.F.R. 1604.52), ill-equipped to cope with intricate legal questions (cf. *Oestereich* v. *Selective Service Board*, *supra*, 393 U.S. at 242 (Harlan, J., concurring)), would insist that they too need representation by

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[33] This assessment was made by General Lewis B. Hershey, then Director of the Selective Service System, and relates directly to the decision below. See letter dated October 3, 1969 from General Hershey to the Attorney General, attached hereto as Appendix C. It has been estimated by the System that the number of personal appearances throughout the United States during the year ending September 30, 1969 was between 190,000 and 210,000, with approximately 28,000 to 30,000 of these involving claimants to conscientious objector status. See letter dated October 7, 1969, from Associate General Counsel, Selective Service System, to Acting Chief of the Administrative Regulations Section, Criminal Division, Department of Justice, attached hereto as Appendix D.

counsel.[34] Thus, the personal appearance would necessarily be transformed into a full *adversary* proceeding. In this context, serious questions not in issue under present procedures would become ripe for consideration. For example, should the registrant be permitted to subpoena, confront and cross-examine witnesses (cf. *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 269-270)?[35] Must the proceeding be stenographically recorded?[36] And, should the local board be required to state on the record its reasons for assigning a given classification and indicate the evidence on which it relied (cf. *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 271)?[37] Moreover, there is the serious question

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[34] While the government appeal agent is required to "attend such local board meetings as the local board may request" (32 C.F.R. 1604.71(d)(2)), his duties to both the board and the registrant (32 C.F.R. 1604.71(d)(5)) may well prompt the board under the circumstances to desire independent counsel.

[35] The regulation now provides that "[n]o person other than a registrant shall have the right to appear in person before the local board * * *" (32 C.F.R. 1624.1(b)).

[36] Cf. the request of appellee's attorney in this case (A. 12-13). If the proceeding is to be recorded, would something like a court reporter system be necessary? Would indigent registrants be entitled to free transcripts? Cf. *Hardy* v. *United States*, 375 U.S. 277; *Coppedge* v. *United States*, 369 U.S. 438, 446.

[37] The traditional rule, first laid down by this Court (*Estep* v. *United States*, 327 U.S. 114, 122-123; *Dickinson* v. *United States*, 346 U.S. 389, 394; *Witmer* v. *United States*, 348 U.S. 375, 380-381), and now codified by statute (50 U.S.C. App. (Supp. V) 460(b)(3)), has been that the classification assigned by the local board is valid and not subject to review if it has a "basis in fact" discoverable from the record.

whether the right conferred contemplates the appointment of counsel for indigent registrants unable to afford retained counsel.[38] If so, tangential considerations come to mind—*e.g.*, whether counsel should be appointed by a local board of laymen, and whether he should be compensated, or, like board members, be expected to serve without compensation.

The far-reaching implication is clear—a judicial or quasi-judicial atmosphere, which Congress explicitly recognized as being alien to the proper functioning of the Selective Service System, would ultimately so pervade the entire induction machinery as to make the achievement of its objective difficult if not impossible. Cf. *Estep* v. *United States*, *supra*, 327 U.S. at 137-141 (Frankfurter, J., concurring). Against this background, the decision to deny registrants representation by counsel at personal appearances before their local boards meets the requirements of due process.

3. Nor are we able to find any decision of this Court which lends support to a contrary conclusion. *In re Gault*, 387 U.S. 1, on which the district court placed heavy reliance (A. 32, 36, 37), is wholly inapposite. There the juvenile proceeding in question was by nature *accusatorial*, differing from an ordinary criminal trial only in regard to the age of the accused and the correctional as distinguished from

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[38] Cf. *Gideon* v. *Wainwright*, 372 U.S. 335, 344; *Miranda* v. *Arizona*, 384 U.S. 436, 472-473. But see *Goldberg* v. *Kelly*, *supra*, 397 U.S. at 270 (welfare recipient has due process right to retained but not appointed counsel at hearing on termination of benefits).

punitive theory of the juvenile's commitment (387 U.S. at 36). Thus, the rationale underlying *Gideon* v. *Wainwright*, 372 U.S. 335, was applicable there. But it was only in this adversary and potentially punitive context that the Court conferred on a juvenile charged with delinquent behavior a right under the Due Process Clause to a hearing, at which he was entitle to be represented by counsel, before he could be committed to a special institution for juvenile delinquents.

Goldberg v. *Kelly*, 397 U.S. 254, is equally distinguishable, and on similar grounds. There the proceeding involved, while not accusatorial, was of a conventional *adversary* character. Thus, while "a particular order of proof or mode of offering evidence" was not required (397 U.S. at 269), the welfare recipient involved was "given an opportunity to confront and cross-examine the witnesses" (397 U.S. at 270), the decision as to termination of benefit payments had to "rest solely on the legal rules and evidence adduced at the hearing" (397 U.S. at 271), and the "decision maker" was required to "state the reasons for his determination and indicate the evidence he relied on" (397 U.S. at 271). In conferring on the welfare recipient a due process right to be represented by retained counsel, the Court, citing *Powell* v. *Alabama*, 287 U.S. 45, 68-69,[39] made spe-

[39] This was a criminal case (charging a capital offense) raising the question of whether an accused defendant was entitled to representation by appointed counsel under the Due Process Clause of the Fourteenth Amendment. The portion of the *Powell* opinion relied on by the Court in *Gold-*

cial mention of the fact that in an evidentiary hearing of the type contemplated there was a need for counsel to be present to help "delineate the issues, present the factual contentions in an orderly manner, conduct cross-examination, and generally safeguard the interests of the recipient" (397 U.S. at 270-271). Extension of that holding to the present case, involving a non-adversary proceeding where no such need exists (see *supra*, p. 41), is, we submit, clearly not warranted.

A decision by this Court more nearly in point than either *Gault* or *Goldberg*, and one which lends support to the position taken here, is *United States* v. *Nugent*, 346 U.S. 1. Although not a "right to counsel" case, as the court below noted (A. 35), *Nugent* did call into question, on both statutory and constitutional due process grounds, certain Selective Service pre-induction procedures as applied to a claimant to conscientious objector status.[40] In concluding that the

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berg included a comprehensive discussion of why the right to counsel should be afforded all *defendants* at a hearing to determine guilt or innocence as a matter of constitutional due process. The *Powell* Court concluded that, "[i]f in *any case*, civil or criminal, a state or federal *court* were arbitrarily to refuse to hear a party by counsel * * *, it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense" (287 U.S. at 69) (emphasis added).

[40] The case arose under the Selective Service Act of 1948, which provided that all appeals relating to a conscientious objector claim would be referred by the appeal board to the Department of Justice for "appropriate inquiry" and a "hearing" (see Section 6(j) of 1948 Act (50 U.S.C. App. (1964 ed.) 456(j)). This "6(j) hearing" was eliminated from the

statutory requirement for a Department of Justice "hearing" did not contemplate affording to a claimant the right to make "an all-out collateral attack at the hearing on the testimony obtained in * * * prehearing investigation" (346 U.S. at 9), the Court, as suggested below (A. 34-35), was persuaded largely by the fact that the "6(j) hearing" was intended by Congress merely "to render an auxiliary service to the appeal board" (346 U.S. at 8). In these circumstances, it was determined that the Department's refusal to produce FBI investigatory reports or identify adverse witnesses at such an auxiliary hearing was not outside the scope of the statutory authority granted by Congress, notwithstanding the absence of any explicit reference in the Act itself authorizing such an approach.[41]

Act by the 1967 amendments. In *Nugent*, the precise issue was whether a refusal by the Department of Justice at such a "hearing" to turn over FBI investigatory reports or identify the names of parties interviewed pursuant to its pre-hearing investigations was in violation of the claimant's rights under the statute to a "hearing" as provided in Section 6(j) or, in the alternative, contravened procedural due process requirements of the Fifth Amendment.

[41] The dissenting opinion by Mr. Justice Frankfurter, quoted in part by the court below (A. 36), was directed solely to this part of the decision—that is, to the "construction of congressional language" (346 U.S. at 12)—and not to the Court's determination under the Due Process Clause. Thus, he stated: "And, of course, only within narrow limits may courts reject a procedure, devised by Congress, on constitutional grounds. The Due Process Clause cannot be bent to what a judge may privately think is wisdom in respecting dissident views" (346 U.S. at 12).

Turning then to the constitutional issue,[42] the *Nugent* Court adopted the approach we urge should be applied in the present case. Recognizing that Selective Service procedures need to be "adequate to do justice in cases where the sincerity of another's religious convictions is the ultimate factual issue" the Court emphasized that "these procedures must be geared to meet the imperative needs of mobilization and national vigilance—when there is no time for 'litigious interruption'" (346 U.S. at 10). In this context, it upheld the Department's refusal in a "6 (j) hearing" to produce FBI reports and identify adverse witnesses as consistent with the fundamental considerations of fairness embodied in the concept of due process. A similar result would seem to follow here.[43]

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[42] The suggestion by the district court (A. 35) that the rationale in *Nugent* was not followed in *Greene* v. *McElroy*, 360 U.S. 474, is misleading. In *Greene* the Court was unable to find congressional authorization for the Department of Defense's refusal at a hearing to produce classified information or identify adverse witnesses; accordingly, it never reached the constitutional question.

[43] In suggesting that a different result is required in this case because "now the hearing before the board is determinative" (A. 35), the court below failed to separate the discussion in *Nugent* on the "authorization issue" from the Court's consideration of the constitutional question. Moreover, the court below appears to have ignored the fact that procedures at local board proceedings have undergone no basic change since the *Nugent* decision. Thus, to the extent that personal appearances might "now" be "determinative" hearings, they were then. In this regard, it is relevant to note that the Court in *Nugent* made explicit mention of the function

Also supporting this view is the decision by this Court in *In re Groban*, 352 U.S. 330, sustaining under the Due Process Clause an inquiry by the Ohio State Fire Marshal into the causes of a fire, notwithstanding the denial to subpoenaed witnesses (on whose premises the fire occurred) of representation by counsel. There the guiding consideration was that the essential purpose of the Fire Marshal's inquiry was not "to adjudicate appellants' responsibilities for the fire," but to pursue a legislative policy of fire prevention by determining "the causes and circumstances of the fire" (352 U.S. at 332). Despite the fact that the Fire Marshal had authority, after questioning a witness, to arrest him if he believed there was sufficient evidence to support a charge of arson, the Court held (352 U.S. at 334):

> We cannot say that this determination [to deny witnesses representation by counsel at a Fire Marshal's inquiry] is unreasonable. The presence of advisors to witnesses might easily so far encumber an investigatory proceeding as to make it unworkable or unwieldy. And with so weighty a public interest as fire prevention to protect, we cannot hold that the balance has been set in such a way as to be contrary to "fundamental principles of liberty and justice." * * *

The same rationale was applied in *Anonymous* v. *Baker*, 360 U.S. 287, involving a denial of represen-

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of local boards in the induction process and even cited with apparent approval "32 C.F.R. (1949 ed.) Part 1624" (346 U.S. at 8), the first section of which contains the denial of counsel prohibition in question in this case. Cf. *Uffelman* v. *United States*, *supra*, 230 F.2d at 303.

tation by counsel to subpoenaed witnesses appearing before "a state judicial [i]nquiry into alleged improper practices at the local bar" (360 U.S. at 288). In upholding the constitutionality of the challenged procedure, the Court, following *Groban*, emphasized that the inquiry was a non-adversary one which the appellants were requested to attend not as potential accused but "solely as witnesses" (360 U.S. at 298)." See also *Madera* v. *Board of Education, supra.*

In sum, precedent combines with considerations of practicality to argue strongly against a right to counsel at local board appearances as a matter of constitutional due process. To the extent that the decision below intimates that a contrary conclusion on this issue is proper, it is incorrect and should be overturned by this Court.

" The Court, in both *Groban* and *Anonymous* v. *Baker*, made reference by way of analogy to a grand jury inquiry, where a witness "cannot insist, as a matter of constitutional right, on being represented by his counsel" (352 U.S. at 333; see also 360 U.S. at 292).

CONCLUSION

For the reasons stated, the case should be transferred to the court of appeals for consideration of the merits of the appeal by that court in the first instance. If the Court concludes, however, that it has jurisdiction over this direct appeal, the judgment of the district court should be reversed and the case remanded to that court with directions to reinstate the indictment.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

WM. BRADFORD REYNOLDS,
Assistant to the Solicitor General.

BEATRICE ROSENBERG,
PHILIP R. MONAHAN,
ROGER A. PAULEY,
Attorneys.

JULY 1970.

APPENDIX A

1. 18 U.S.C. 3731 provides in pertinent part:

An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof, where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment or information is founded.

* * * *

From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy.

An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

From a decision or judgment setting aside, or dismissing any indictment or information, or any count thereof except where a direct appeal to the Supreme Court of the United States is provided by this section.

* * * *

If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to

hear and determine the same as if the appeal had been taken to that court in the first instance.

* * * *

2. Section 10(b) of the Military Selective Service Act of 1967,[46] 62 Stat. 619-620, as amended, 81 Stat. 104 (50 U.S.C. App. 460(b)), provides in pertinent part:

(b) The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this title;

* * * *

(3) to create and establish within the Selective Service System civilian local boards, civilian appeal boards, and such other civilian agencies, including agencies of appeal, as may be necessary to carry out its functions with respect to the registration, examination, classification, selection, assignment, delivery for induction, and maintenance of records of persons registered under this title, together with such other duties as may be assigned under this title: *Provided*, That no person shall be disqualified from serving as a counselor to registrants, including service as Government appeal agent, because of his membership in a Reserve component of the Armed Forces. * * * Such local boards

[46] Formerly known as the "Universal Military Training and Service Act" and, before that, as the "Selective Service Act of 1948" (62 Stat. 604, 65 Stat. 75).

> * * * shall, under rules and regulations prescribed by the President, have the power * * * to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title, of all individuals within the jurisdiction of such local boards. * * *

* * * *

3. 32 C.F.R. 1604.41, 1604.71, 1624.1, and 1624.2 provide:

§ 1604.41 *Appointment and duties.*

Advisors to registrants may be appointed by the Director of Selective Service upon recommendation of the State Director of Selective Service to advise and assist registrants in the preparation of questionnaires and other selective service forms and to advise registrants on other matters relating to their liabilities under the selective service law. Every person so appointed should be at least 30 years of age. The names and addresses of advisors to registrants within the local board area shall be conspicuously posted in the local board office.

* * * *

§ 1604.71 *Appointment and duties.*

(a) For each local board a government appeal agent shall be appointed by the President upon recommendation of the Governor.

(b) One or more associate government appeal agents may be appointed by the President for each local board when either the government appeal agent appointed for that board or the local

board requests such assistance and the Governor, being of the opinion that the circumstances warrant such action, recommends appointment. Whenever an intercounty local board is established an associate government appeal agent shall be appointed by the President, upon recommendation of the Governor, for each county included within the local board area.

(c) Each government appeal agent and associate government appeal agent shall be, whenever possible, a person with legal training and experience.

(d) It shall be the duty of the government appeal agent and in his absence or inability to act or at his direction, the duty of the associate government appeal agent:

(1) To appeal, as prescribed by the regulations in this chapter, from any classification of a registrant by the local board which is brought to his attention and, in his opinion, should be reviewed by the appeal board.

(2) To attend such local board meetings as the local board may request him to attend.

(3) To suggest to the local board a reopening of any case where the interests of justice, in his opinion, require such action and to submit to the local board, with such suggestion, the information obtained by his investigation of the case which has caused him to arrive at his decision that the case should be reconsidered.

(4) To render such assistance to the local board as it may request by advising the members and interpreting for them laws, regulations, and other directives.

(5) To be equally diligent in protecting the interests of the Government and the rights of the registrant in all matters.

(e) The State Director of Selective Service may authorize any duly appointed government appeal agent or associate government appeal agent to perform such duties for any local board within the state.

* * * *

§ 1624.1 *Opportunity to appear in person.*

(a) Every registrant after his classification is determined by the local board, except a classification which is determined upon an appearance before the local board under the provisions of this part, shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 30 days after the local board has mailed a Notice of Classification (SSS Form 110) to him. Such 30-day period may not be extended.

(b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant: *Provided*, That if the registrant does not speak English adequately he may appear with a person to act as interpreter for him: *And provided further*, That no registrant may be represented before the local board by anyone acting as attorney or legal counsel.

§ 1624.2 *Appearance before local board.*

(a) At the time and place fixed by the local board, the registrant may appear in person before the member or members of the local board designated for the purpose. A notation that he

has appeared shall be entered on the Classification Questionnaire (SSS Form No. 100).

(b) At any such appearance, the registrant may discuss his classification, may point out the class or classes in which he thinks he should have been placed, and may direct attention to any information in his file which he believes the local board has overlooked or to which he believes it has not given sufficient weight. The registrant may present such further information as he believes will assist the local board in determining his proper classification. Such information shall be in writing, or, if oral, shall be summarized in writing by the registrant and, in either event, shall be placed in the registrant's file. The information furnished should be as concise as possible under the circumstances. The member or members of the local board before whom the registrant appears may impose such limitations upon the time which the registrant may have for his appearance as they deem necessary.

(c) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board shall consider the new information which it receives and, if the local board determines that such new information justifies a change in the registrant's classification, the local board shall reopen and classify the registrant anew. If the local board determines that such new information does not justify a change in the registrant's classification, it shall not reopen the registrant's classification.

(d) After the registrant has appeared before the member or members of the local board designated for the purpose, the local board, as soon as practicable after it again classifies the registrant,

or determines not to reopen the registrant's classification, shall mail notice thereof on Notice of Classification (SSS Form No. 110) to the registrant and on Classification Advice (SSS Form No. 111) to the persons entitled to receive such notice or advice on an original classification under the provisions of § 1623.4 of this chapter.

(e) Each such classification or determination not to reopen the classification made under this section shall be followed by the same right of appeal as in the case of an original classification.

APPENDIX B

Review of the Administration and Operation of the Selective Service System, Hearings before the Committee on Armed Services of the House of Representatives, 89th Cong., 2d Sess., June 22, 23, 24, 28, 29, and 30, 1966 (Doc. No. 75), pp. 9889-9890, 9916, 9920-9922, 9984-9988:

* * * *

CORRESPONDENCE SUBMITTED BY HON. MELVIN R. LAIRD, REPRESENTATIVE FROM WISCONSIN

JULY 7, 1966.

Hon. MELVIN R. LAIRD,
House of Representatives,
Washington, D.C.

DEAR MR. LAIRD: I have your recent letter in which you forwarded for my information the views of your constituent Mr. John D. Day of Marshfield, Wisconsin, concerning a desirable change in Selective Service regulations.

Mr. Day believes that the present policy of Selective Service regulations which preclude a registrant's representation by legal counsel before the board is inequitable and recommends that this right be granted the registrant.

I fully appreciate the views of Mr. Day and, therefore, will make them available to the Committee for its consideration by virtue of its inclusion in the record.

Sincerely,

L. MENDEL RIVERS, *Chairman.*

CONGRESS OF THE UNITED STATES
HOUSE OF REPRESENTATIVES,
Washington, D.C., June 30, 1966.

Hon. L. MENDEL RIVERS,
Chairman,
House Armed Services Committee,
Rayburn House Office Building,
Washington, D.C.

(Attention: Mr. Slatinshek).

DEAR CHAIRMAN: Enclosed is a letter from my constituent, John D. Day, Attorney at Law, Marshfield, Wisconsin, enclosing a copy of one addressed to Jerry J. Kobs, Spencer, Wisconsin, stating that Selective Service regulations do not provide for registrants to be represented before the local board by legal counsel.

I would appreciate consideration during your Committee's current review of Selective Service policies and procedures of Mr. Day's recommendation that draftees be given an opportunity to appear before their local boards with legal counsel of their choice.

With best wishes and kindest personal regards, I am.

Sincerely yours,

MELVIN R. LAIRD,
Member of Congress.

HOERL, DAY & KAMPS,
Marshfield, Wis., June 27, 1966.

Congressman MELVIN R. LAIRD,
Rayburn House Office Building,
Washington, D.C.:

DEAR SIR: I am enclosing a copy of a letter which a client of mine has received from the Marathon County Local Board 38 relative to a request for a personal appearance before the board concerning a draft classification.

I am assuming that they are correct in their statement of the regulations. However, it appears to me that a citizen should be entitled to be represented by counsel of his choice, at any hearing before any admisitrative [*sic*] body and, with no reflection on Mr. Tinkham, who of course is an excellent attorney, it would appear to me that on a broad basis, the idea that a person requesting a change in classification should seek advise [*sic*] from a Government appeal agent is somewhat like defendants in court cases obtaining advise from the prosecuting attorney.

The reason for this letter is that I understand that at the present time from reading the papers there is an investigation being conducted by Congress and hearings being held on the Selective Service System. I would suggest that one very fundamental right to be given the draftee should be an opportunity to appear before the board or anyone else with any counsel he wishes to hire and I would appreciate it if you bring this to the

attention of the committee making the current investigation.

Thank you.

Yours very truly,

JOHN D. DAY.

MARATHON COUNTY LOCAL
BOARD 38,
SELECTIVE SERVICE SYSTEM,
Wausau, Wis., June 23, 1966.

Mr. JERRY J. KOBS,
Spencer, Wis.:

DEAR MR. KOBS: We are in receipt of your request for a personal appearance which was filed on your behalf by Hoerl, Day & Kamps, together with your mother's request for appeal of classification.

Your request for personal appearance specified that you wished your attorney to appear with you. Selective Service regulations provide that no registrant may be represented before the local board by anyone acting as attorney or legal counsel. However, we have requested that the Government appeal agent, Attorney Richard P. Tinkham, be present at this appearance, and he will offer you whatever advice you desire.

If, after this personal appearance, your hardship deferment is not granted, you will receive a new notice of classification and your file will be forwarded to the appeal board based on your mother's request.

For the local board:

ELIZABETH WILSON, *Clerk.*

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* * * *

STATEMENT OF HON. WILLIAM F. RYAN,
REPRESENTATIVE FROM NEW YORK

* * * *

Mr. Chairman, a second major deficiency in the operation of the present system is the composition and operation of the boards of appeals.

* * * *

The role of the 95 appeal boards in the Selective Service System can be extremely important. The registrant has an absolute right of appeal, and classification by the appeal board is an independent, de novo action. Indeed, in some areas the appeals board exercises a great deal of independent discretion. During 1965 in the District of Columbia, for example, the board reversed 49 of the 110 cases which were appealed.

The appeals system should have at least two primary functions. First, it should offer the registrant an opportunity to get a new full and fair hearing on his record. And second, it should serve—as General Hershey says it does serve—to bring a measure of uniformity to an essentially diverse system.

The procedures followed by the appeals board, however, assure neither a fair review of a man's record, nor national uniformity of standards.

In appealing his classification, a young man should have the right to a full review of his record. That is the purpose of the boards. Yet, under the present regulations, registrants are not permitted to have the advantage of counsel. Nor is the registrant himself permitted to appear before the board.

Mr. PHILBIN. Your time has expired. If you choose to make a brief summation of your remarks, you may do so.

Mr. RYAN. Yes, Mr. Chairman. If I might, I should argue the registrant should have the assistance of counsel in presenting their cases to the board. I think this is very important.

If I may have permission to extend my remarks on this question, of counsel, I would appreciate that.

Mr. PHILBIN. You may extend your remarks in any manner in which you wish, to present it for the record.

(The balance of Mr. Ryan's prepared statement is as follows:)

Consequently, the appeal board review is altogether different from the system of appeals in the courts.

Ideally, I think that registrants should be able to have the assistance of counsel in presenting their case to the appeals board. The chief argument against this seems to be that it would slow down the operation of the draft, and raise thorny and intricate procedural questions and questions of administrative law. But I would point out that of the 2.4 million men classified by the Selective Service System in 1965, only 9,741 took their cases to the appeal boards. Consequently, it would seem that a more thorough appellate procedure would not threaten the operation of the system.

I should also point out that the system does presently employ government appeal agents and advisers to registrants, who are expected to help registrants with technical or legal problems. However, from what information I have been able to obtain from the Selective Service System, it would appear that neither the appeal agents nor the advisers to registrants can be depended on to help the registrants. Their services are voluntary, and in many communi-

ties, according to General Hershey's staff, they appear to do little work at all.

* * * *

In conclusion, it seems clear that one of the strongest criticisms of the Selective Service System is that it is not fair. To some extent, fairness can be assured by establishing a system which resembles the court system in this country. It is for that reason that there are local boards, appeals boards, and a National Appeals Board. But the resemblance to the judicial system is transparently false. The judges are not always impartial; the registrant has no right to counsel; and there is no method of establishing precedent.

Whatever the committee should decide to do about preserving the Selective System System, I strongly urge you to review carefully the selection of the local boards, and the selection and operation of the boards of appeal.

* * * *

Subsequent to the termination of current committee hearings on the draft law, Gen. Lewis B. Hershey, the Director of Selective Service, submitted for the committee's review his summary of the various recommendations and observations made by witnesses who appeared before the committee.

Because of the pertinency of this summary, it is included in the record at this point. However, it must be emphasized that though this summary was requested from General Hershey by the Committee on Armed Services, it does not necessarily reflect the views of the committee.

The material submitted by General Hershey is as follows:

The following are the suggestions, either implied or expressed, identified in our analysis of testimony and statements submitted by Members of the Congress and others before the committee during the selective service posture hearings of 1966.

Those witnesses who made the suggestion are listed after each item.

Not included are suggestions that the present philosophy, policy, and procedures are sound and should be unchanged.

I. Aspects of the functions, responsibility, procedures, and composition of local and appeal boards, and the guidance furnished them were discussed by several members of the Congress.

* * * *

(e) Registrants should have the right to be represented by counsel of their choice before the local board (Rep. Laird) and have counsel and a full hearing before the appeal board. (Rep. Ryan)

* * * *

(Attached, as requested during the selective service posture hearings, are suggestions contained in the testimony presented by various members of the Congress, together with comments on the suggestions by the Director of Selective Service.)

I. Aspects of the functions, responsibility, procedures, and composition of local and appeal

boards, and the guidance furnished them were discussed by several members of the Congress.

* * * *

(e) Registrants should have the right to be represented by counsel of their choice before the local board and have counsel and a full hearing before the appeal board.

The selective service classification procedure involves a determination with respect to the availability of a registrant for military service, made by a board composed of the young man's neighbors who are generally without legal training and always uncompensated. It has been our feeling through the years that procedures should be kept so simple that it would not be necessary to have legal counsel at a hearing; and that it would be unfair to the many who cannot afford to hire attorneys if the sons of other families were permitted to have their cases presented by legal counsel.

On the other hand, it was realized that all registrants should have reasonable access to legal advice. With this in mind, there is attached to each local board a Government Appeal Agent who is, with rare exceptions, an attorney. This official is uncompensated and is charged with the duty of being equally diligent in protecting the interests of the Government and the rights of the registrant in all matters. Each registrant, therefore, has available to him ample assistance, without cost, to aid in determining his rights and obligations under the selective service law.

The provision that no registrant should be represented before the local board by anyone acting as attorney or legal counsel appeared in regulations issued under the 1940, as well as the pres-

ent law. The present provision has been in our regulations since 1948, when it was promulgated by Executive order issued by President Truman.

The Congress has recently recognized the wisdom of this provision. In its report No. 1141 relative to S. 1758, a bill "Providing for the right of persons to be represented in matters before Federal agencies," the Committee on the Judiciary, House of Representatives, said:

"In this connection the committee wishes to make clear that the bill would not affect the operation of the boards of the Selective Service System. The functions performed under the Universal Military Training and Service Act are expressly excluded from the operation of the Administrative Procedure Act, except those relating to public information. Under regulations prescribed by the President a registrant may not be represented before a local board by an attorney. This is because of the large number of registrants involved, the informality of procedures, and the need for a capacity to provide large numbers of men quickly for service. The present bill is designed to do away with special agency bars where Congress has given an affirmative right to representation. It does not extend a right of representation to the Selective Service System, where the right does not now exist."

It is not believed that it would be beneficial to the registrant or his counsel to have the right to appear before the appeal boards. The registrant may appear before the local board and present information, written or oral. Any interested party may present written information to the local board. All of this information is considered by the local board. If the registrant ap-

peals his classification this information is reviewed by the appeal board and it classifies the registrant de novo. The appeal board should consider the same evidence and information that the local board considered. It may come to a different decision based on the facts but it is not believed that oral arguments at this stage are desirable or beneficial. The important thing is the judgment of the appeal board composed of five individuals basing its opinion on a review of all the facts that have been presented and are included in the file. Thus, the registrant, the dependent, the employer, and the Government have had the benefit of the opinions of from three to five local board members, and if there is a dissenting vote at the appeal board level an appeal may be made to the President.

* * * *

APPENDIX C

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
1724 F Street N.W.
Washington, D. C. 20435

Office of the Director Address Reply to
The Director of Selective Service

Oct. 3, 1969

The Honorable

The Attorney General

Subject: Thomas William Weller
Criminal No. 42614
SS No. 4-22-44-351

Dear Mr. Attorney General:

The United States District Court for the Northern Judicial District of California, speaking through Judge Robert F. Peckham, on or about September 19, 1969, made an order granting the above defendant's Motion to Dismiss Indictment. The Court based its order upon the fact that denial of Selective Service Local Board No. 22 of the defendant's request to have his attorney present at a meeting of the local board for the purpose of advising the defendant with respect to his rights constituted to denial of a constitutional right.

The effect of this decision, if allowed to stand unchallenged, would be to place an intolerable burden upon the administration of the Selective Service System in the Northern District of California, and, if extended to other jurisdictions, would result in constructive paralysis of the Selective Service System in

the performance of its mission of procurement of manpower for the Department of Defense. The Courts of Appeal of the United States which have considered this question have unanimously held that no such right to counsel on the part of a selective service registrant in his dealings with the Selective Service System exists, and, in doing so have pointed out that the military selection and induction process is neither a punitive process nor an adversary proceeding. In this regard, the following citations, not intended to be inclusive, are furnished:

> *Nickerson* v. *United States*, 391 F.2d 760 (10th Cir.), *cert. denied* 392 U.S. 970 (1968); *United States* v. *Dicks*, 392 F.2d 524 (4th Cir. 1968); *United States* v. *Capson*, 347 F.2d 959 (10th Cir. 1965); *Tantash* v. *United States*, 409 Fed. 2d 227 (9th Cir. 1969); *Haven* v. *United States*, 403 Fed. 2d 384 (9th Cir. 1968).

The Congress of the United States, in enacting and re-enacting the selective service laws during the past twenty-nine years, has been well aware of those provisions of the selective service regulations which discouraged the presence of legal counsel for registrants.

I am, therefore, making this formal request on you, under the authority given to me in Section 12(c) of the Military Selective Service Act of 1967, to proceed as expeditiously as possible in asking for an appeal to the Supreme Court of United States in order that this case may be heard and this vital issue decided by the Supreme Court.

Sincerely yours,

/s/ Lewis B. Hershey
Director

APPENDIX D

NATIONAL HEADQUARTERS
SELECTIVE SERVICE SYSTEM
1724 F Street N.W.
Washington, D. C. 20435

Office of the Director — Address Reply to
The Director of Selective Service

Oct. 7, 1969

Mr. John L. Murphy
Acting Chief, Administrative
Regulations Section
Criminal Division
Department of Justice
Washington, D. C.

Attention: Mr. Ezra Friedman

Subject: WELLER, Thomas William
Criminal No. 42614
SS No. 4-22-44-351

Dear Sir:

The Director of Selective Service recently requested that an appeal be taken in the subject case in which the Honorable Robert F. Peckham dismissed a Selective Service Indictment because the defendant was not allowed by his local board to have an attorney present at the personal appearance meeting. By way of illustration of the administrative havoc that would be wrought in the functioning of the Selective Service System if the rule in the subject case were allowed to stand and attorneys be allowed to be present for each personal appearance, the following data as to personal

appearances for a one-year period commencing October 1, 1968, and ending September 30, 1969, is furnished below:

> Based upon a 1% statistical sample taken by the Research and Statistics Division of this Headquarters, the number of personal appearances had by the registrants throughout the United States for the year ending September 30, 1969, is estimated to be between 190,000 and 210,000. Included in the latter figure are all personal appearances made by conscientious objectors which are estimated to be between 28,000 and 30,000.

For The Director,

/s/ Roy R. Bartlett
ROY R. BARTLETT
Lt. Colonel, JAGC
Associate General Counsel

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 77

UNITED STATES OF AMERICA,

Appellant,

—v.—

THOMAS WILLIAM WELLER,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEE

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United States v. Turner, 421 F.2d 1251 (3rd Cir. 1970) 54
United States v. Wade, 388 U.S. 218 (1967) 86, 87, 88, 92
United States v. Washington, 392 F.2d 37 (6th Cir. 1968) 77
United States v. Weersing, 415 F.2d 130 (9th Cir. 1969), *cert. denied* 396 U.S. 987 (1970) 18
United States v. Wierzchucki, 248 F. Supp. 788 (W.D. Wisc. 1965) 55, 67, 68, 85, 86
United States v. Williams, 420 F.2d 288 (10th Cir. 1970) 96

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United States v. Willis, 409 F.2d 830 (5th Cir.), *cert. denied* 396 U.S. 864 (1969) 68
United States ex rel. Berman v. Craig, 207 F.2d 888 (3rd Cir. 1953) 54
United States ex rel. Brown v. Resor, —— F.2d ——, 3 S.S.L.R. 3188 (10th Cir. July 21, 1970) 77
United States ex rel. Castro-Louzan v. Zimmerman, 94 F. Supp. 22 (E.D. Pa. 1950) 62
United States ex rel. Vaccarino v. Officer of the Day, 305 F. Supp. 732 (S.D.N.Y. 1969) 54

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Welsh v. United States, 398 U.S. 333 (1970) ..... [illegible]
West Ohio Gas Co. v. Public Utilities Commission of Ohio (No. 1), 294 U.S. 63 (1935) 43, 58
Willner v. Committee on Character and Fitness, 373 U.S. 96 (1963) 58
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Yates v. United States, 404 F.2d 462 (1st Cir. 1968), *cert. denied* 395 U.S. 925 (1969) 18
Yiannopoulos v. Robinson, 247 F.2d 655 (7th Cir. 1957) 62
Youngstown Sheet and Tube Co. v. Sawyer, 343 U.S. 579 (1952) 26

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Other Authorities:

ABA Code of Professional Responsibility, EC4-1 (Adopted by ABA House of Delegates, Aug. 12, 1969, effective Jan. 1, 1970) 95
ABA Informal Opinion No. 287 95
ABA Informal Opinion No. 1026 95
Air Force Regulation 35-24, ¶8b(4) (May 1, 1970) 79
Army Regulation 135-25, ¶7b(3) (June 17, 1970) 79
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Coast Guard Commandant Instruction 1900.2, ¶5 (Oct. 7, 1968) 79
41 Cong. Rec. 2752 (1907) 16
41 Cong. Rec. 2753 (1907) 17
113 Cong. Rec. 12503 34
Davis and Dolbeare, LITTLE GROUPS OF NEIGHBORS: THE SELECTIVE SERVICE SYSTEM (1969) 47, 92
Department of Defense Directive 1300.6 ¶VIB4 (May 10, 1968) 2, 79
Department of the Navy Bupers Instruction 1900.5, ¶3 (July 18, 1968) 79

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Executive Order No. 11555, 35 Fed. Reg. 14191 (1970) 49

Federalism and State Criminal Procedure, 70 HARV. L. REV. 1 (1956) 61

Forkosch, *The Constitutionality of the Vietnam Venture and a Registrant's Right to Counsel Within the Selective Service System,* 22 So. CAR. L. REV. 287 (1970) 44, 99

Friedenthal, Government Appeals in Federal Criminal Cases, 12 Stan. L. Rev. 71 (1959) 16, 23

Gellhorn and Byse, ADMINISTRATIVE LAW, 664 (1954 ed.) 93

Handler, *Controlling Official Behavior in Welfare Administration,* 54 CAL. L. REV. 479 (1966) 92

Hershey, *Legal Aspects of Selective Service,* 28 (rev'd ed. 1969) 19, 42, 83

H.R. Rep. No. 267, 90th Cong., 1st Sess., 31 91

Kurland, *The Mersky Case and the Criminal Appeals Act: A Suggestion for Amendment to the Statute,* 28 U. Chi. L. Rev. 419 (1961) 22-23

Layton, Lawyers Cannot Be Informants, 54 ABAJ 153 (1968) 95

Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace,* 54 U. VA. L. REV. 1355 (1968) 64

Marine Corps Order 1306.16B, ¶7b(4) (June 18, 1969) 79

McKinney's New York Session Laws 1969 81

OEO Pamphlet 6140-2 98

Review of the Administration and Operation of the Selective Service System, An Interim Report of the Committee on Armed Services of the House of Representatives, 89th Cong., 2d Sess., August 4, 1966 (Doc. No. 76) 32, 36

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Review of the Administration and Operation of the Selective Service System, Hearings Before the Committee on Armed Services of the House of Representatives, 89th Cong., 2d Sess., June 22-24, 28-30, 1966 (Doc. No. 75), 9984 32

REPORT OF THE NATIONAL ADVISORY COMMISSION ON SELECTIVE SERVICE (the Marshall Commission), IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE? (1967) 46, 90, 94, 97

Right of Counsel in the Selective Service System, Hearing Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 90th Cong., 2d Sess., May 16, 1968 98

Rivkin, GI RIGHTS AND ARMY JUSTICE: THE DRAFTEE'S GUIDE TO MILITARY LIFE AND LAW, 360 (1970) 99

Smith and Bell, *The Conscientious Objector Program —A Search for Sincerity,* 19 U. PITT. L. REV. 695 (1958) 51, 64, 78, 91

Stern & Gressman, *Supreme Court Practice* 213 (1969) 26

2 Sutherland, *Statutes and Statutory Construction,* §5107 etc. (3rd ed. 1943) 31, 35

Tatum and Tuchinsky, GUIDE TO THE DRAFT (1969) 272 99

The Selective Service System: Its Operation, Practices, and Procedures, Hearings Before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 91st Cong., 1st Sess., October 29-November 13, 1969 ..... 46, 47, 48, 89

In the

Supreme Court of the United States

October Term, 1970

No. 77

United States of America,

Appellant,

—v.—

Thomas William Weller,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

BRIEF FOR APPELLEE

Jurisdiction

In appellee's view exclusive jurisdiction is conferred on this Court by the Criminal Appeals Act, 18 U.S.C. §3731, and particularly the motion in bar and statutory construction provisions of such Act. See Point I, *infra,* for a full discussion of the jurisdictional questions.

Constitutional Provisions, Statutes and Regulations Involved

This case involves the due process clause of the Fifth Amendment and the assistance of counsel clause of the Sixth Amendment to the United States Constitution.

Pertinent provisions of the Criminal Appeals Act (18 U.S.C. §3731) and §10(b) of the Military Selective Service Act of 1967 (50 U.S.C. App. §460(b)) are reprinted in Appendix A of appellant's brief, pp. 55-57. The relevant provisions of §6(j) of the Selective Service Act of 1948 (former 50 U.S.C. App. §456(j)), 65 Stat. 83, are set forth in Appendix A of this brief, *infra,* pp. 101-102.

Several Selective Service regulations are likewise involved, some of which (32 C.F.R. §§1604.41, 1604.71, 1624.1 and 1624.2) are reprinted in Appendix A of appellant's brief, pp. 57-61. Additional Selective Service regulations which are involved in this case (32 C.F.R. §§1604.52, 1604.52a(a), 1604.54, 1604.55, 1604.57, 1604.58, 1621.15, 1622.1(c), and 1622.20(a)) are set forth in Appendix A of this brief, *infra,* pp. 102-106.

¶VI B 4 of the Department of Defense Directive 1300.6, also relevant, is also set forth in the Appendix, *infra,* p. 106.

Questions Presented

1. Whether this Court has exclusive jurisdiction over this direct appeal by the Government from the decision of the district court which granted a motion to dismiss an indictment for armed forces induction refusal on the grounds that the Selective Service regulation prohibiting counsel at local board personal appearances was not explicitly authorized by statute and is otherwise constitutionally invalid.

2. Whether the Selective Service regulation which prohibits the appearance of counsel for a registrant at a local board personal appearance is invalid because right

of counsel is a traditional procedural safeguard of which a registrant cannot be divested without explicit authorization by act of Congress.

3. Whether the Selective Service regulation which prohibits the appearance of counsel at a local board personal appearance is in violation of a registrant's constitutional right to due process under the Fifth Amendment and to the effective assistance of counsel under the Sixth Amendment.

Statement of the Case

Appellee concurs with so much of the statement of the case as appears in the brief for the United States (pp. 3-5) as recites the chronology of developments. Pursuant to Rule 40(3) of the Rules of this Court, appellee deems it necessary to set forth the following additional statement to correct inaccuracies or omissions appearing in the Government's statement:

1) The initial request by appellee and his counsel (A. 12)* that appellee's counsel be present at the personal appearance hearing was expressly for the purpose, as stated by counsel, "to advise him with respect to his rights." A later communication by appellee's counsel to the chairman of the local board made it clear that:

> "I propose to be present to advise my client as to his rights, and to aid him in any way I could with his presentation of his case to your board. This function is quite distinct from that of *representation* which is all that the cited regulation bars" (A. 18).

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* "A" refers to the Appendix in this Court.

The same letter from appellee's counsel stated as another reason for allowing counsel to be present the fact that under the recently terminated Department of Justice hearing procedures for conscientious objector applicants, counsel was allowed to be present.

> "The appearance before the local board is now the one and only time wherein a registrant may have any kind of hearing, present his case in person, present testimony on his own behalf, and meet his accusers in the sense that he may determine the reasons for prior denial of his claim" (A. 19).

Moreover, appellee's counsel's letter noted that recent decisions of this Court had upheld the right to counsel "where the proceeding involved a matter of the liberty and substantial personal rights of the individual" (A. 19). Finally, appellee's counsel's letter requested, in view of the substantially changed circumstances, "whether the Selective Service System has made a determination of the validity of the prior requirement with regard to exclusion of counsel" (A. 19).

The board chairman responded to this letter and discussed in detail other aspects of the personal appearance, but made no response or comment whatsoever to the request for counsel (A. 21-22).

A subsequent communication from appellee's counsel enclosed a copy of appellee's summary of his personal appearance hearing, expressly disclaimed any waiver of the prior request for counsel, and made the following comment:

> "There is a great and probably growing gap between the generations in our Nation. Communication across this line is difficult under the best of circumstances. Young people do not use the same words and language, or, when they do they may mean quite different things. In a period when they feel an increased alienation from the formal institutions of our society, to ask them to communicate their deep and heartfelt beliefs through cold, formal, letters, is unrealistic" (A. 23-24).

The only response from the board (A. 28) was a letter to appellee, a copy of which was sent to appellee's counsel, advising that the board had decided not to reopen appellee's classification. Subsequent letters by appellee (A. 30) and his counsel (A. 29-30) noted express and specific objection to the board's denial of counsel.

2. There are sharp disparities between the board's 'record' of what transpired at appellee's personal appearance (A. 16-17) and the summary prepared by appellee (A. 24-27). According to the appellee's version, considerably more ensued at the personal appearance than that revealed by the board's version. To cite one specific instance: if the appellee is correct in his statement that the chairman or a member of the board advised him that "it was not their function to judge such legal questions" as "whether they thought that certain sorts of religious beliefs and background were necessary . . ." (A. 24), then the board clearly acted erroneously and failed to exercise its mandated duty to hear and determine all questions concerning classifications. See Point III, Section 1, *infra*.

3. These proceedings occurred in November of 1967. At such time, *United States* v. *Seeger*, 380 U.S. 163 (1965) had

been decided which gave a broader definition to religious training and belief than that which had previously prevailed. The record does not contain any statement of reasons for the board's action (A. 17, A. 28), and it is not at all clear that the board followed the proper standards. Appellee did not have counsel present to assist him in the presentation of his claim and to insist in the application of the proper legal principles.

4. The district court ruled that a local board personal appearance "is a critical stage of an administrative process at which substantial rights are adjudicated" (A. 32), and that the holding by this Court in *Greene* v. *McElroy,* 360 U.S. 474 (1959), requires explicit congressional authorization before any fundamental procedural safeguard may be denied in such an administrative adjudicatory proceeding. *Ibid.* The court carefully reviewed the statute and, finding no such explicit authorization, ruled that the regulation which prohibits counsel at a local board personal appearance (32 C.F.R. §1624.1(b)) is invalid (A. 33). Following *Greene* v. *McElroy, supra,* the court held that any argument of "acquiescence or implied ratification" by congressional inaction was insufficient (A. 33-34). The court below carefully distinguished other decisions holding that there was no constitutional right to counsel under the due process clause for a number of reasons, including that none of these prior decisions had ruled on the question of explicit authorization.

The district court also held, tracing recent decisions of this Court and other courts in other types of administrative adjudications involving personal and property rights, that there was a constitutional right under the due process

clause to counsel at such adjudications. The Government's suggestion (brief, p. 5) that the district court "was careful to circumvent" deciding the constitutional question, is not borne out by a reading of the district court's opinion. However, the district court did refrain from deciding whether there is a right of counsel under the Sixth Amendment.

The opinion of the district court also discussed the useful function which could be played by counsel at a local board personal appearance (A. 39-40), discounted any argument that counsel's presence would cause "litigious interruption" (A. 34-35, A. 39), and noted the inadequacy of the regulations dealing with optional advisors to registrants and government appeal agents (A. 40-41).

Summary of Argument

I.

After its appeal was filed in this Court pursuant to the provisions of the Criminal Appeals Act (18 U.S.C. §3731), the Government changed its position and moved to remand this case to the Court of Appeals for the Ninth Circuit, The Government's motion to remand was denied and further consideration of the jurisdictional question was postponed to the hearing of the case on the merits.

The decision of the district court brings this appeal directly within the motion in bar and statutory construction provisions of the Criminal Appeals Act, thereby conferring exclusive jurisdiction on this Court.

Contrary to the claims of the Government, this Court has never held that the motion in bar provision is constricted

to the common law definition of the term "plea in bar." Rather, this Court has held on many occasions that where an indictment is dismissed prior to trial terminating the cause and exculpating the defendant on the basis of questions of law outside of the general issues to be tried, all of the requisites of a motion in bar have been met. Moreover, where, as here, the defendant "confesses" to the acts charged in the indictment (refusal to report for induction) but "avoids" the consequences of those acts by relying on extraneous matter (refusal to permit counsel at a personal appearance before the local board), the jurisdiction of this Court is clear even under the most restrictive reading of the motion in bar provision. See *United States* v. *Mersky*, 361 U.S. 431, 457 (1960) (dissenting opinion of Mr. Justice Stewart).

Furthermore, the jurisdiction of this Court is mandated also by that provision of the Criminal Appeals Act granting direct appeal where the decision of the district court is based upon the construction of the statute upon which the indictment is founded. As in *United States* v. *Mersky*, *supra*, there is an intimate nexus between the statute and the regulations declared invalid. The district court's determination that the regulation was unauthorized by the Act necessarily involved a direct construction of the Act. Finally, the underlying Congressional purpose of requiring an exclusive appeal to this Court where a district judge dismisses an indictment because of major constitutional questions in the construction or validity of an Act of Congress, is properly served by this Court's retaining jurisdiction, and not acceding to the Government's contention that the case should be remanded to the Court of Appeals for the Ninth Circuit.

Thus direct appeal to this Court is mandated by the Criminal Appeals Act under both the motion in bar provision and the statutory construction provision.

II.

Only Congress has the power, under Article I, §8, of the Constitution, to raise armies, and thus only Congress has the power to establish the procedures by which men are to be conscripted. Without congressional authorization, the President may not establish such procedures at all; and without the most clearly explicit authorization, he may not attempt to establish procedures which deny to registrants traditional procedural safeguards.

The strong statement of this principle enunciated by this Court in *Greene* v. *McElroy,* 360 U.S. 474 (1959), has in no way been weakened by *Hannah* v. *Larche,* 363 U.S. 420 (1960), or any other subsequent case. In the light of *Greene's* clear statement that such explicit authorization is not to be found in mere "acquiescence or non-action," 360 U.S. at 507, the Government is clearly in error in resorting to such an argument.

Moreover, as to the legislative history which is so extensively cited by the Government at pp. 25-31 of its brief, the most that can be said for it is that it is exceedingly ambiguous. The views of General Hershey, as expressed in the Hearings of the House Armed Services Committee, were later expressly rejected by that Committee; Representative Kastenmeier's remarks on the floor of the House clearly were addressed only to the procedures followed at the appeal boards, and had nothing to do with the right to counsel at personal appearances before local boards; and finally, the debate on Senator Morse's amendment to

the 1967 Act was patently so confused and so misleading as to render any "interpretation" based upon it utterly without persuasive value.

III.

The principal constitutional question in this case is whether a selective service registrant has a constitutional right to the advice and assistance of retained counsel at a personal appearance before his local board.

When a registrant exercises his guaranteed right to a personal appearance, it is for the express purpose of contesting a classification which the board has previously given him. The board's function, in line with statute and regulations, is to "hear and determine" all questions or claims with respect to classifications, exemptions and deferments. The broad array of possible classifications, conscientious objector and otherwise, which a local board must consider and determine, perforce requires it to engage in a series of fact-findings, determinations of legal questions, and exercises of discretion.

In performing these functions the local board adjudicates questions involving personal and property rights, much as any other administrative agency performing an adjudicatory function. Furthermore, the regulations governing local board personal appearances, such as swearing of witnesses, subpoena power and burden of proof, bespeak its adversary character.

A number of court decisions have expressly recognized the adjudicative character of local board classification actions, in accord with a host of decisions from other areas of administrative law which have found that the essence of an adjudicatory hearing is the process of hearing and deter-

mining factual and legal questions. The quaint image of local boards as non-adversary "little groups of neighbors" is revealed as a fiction upon analysis of the board's processes and functioning. This analysis is buttressed by various studies which have been made and a number of decisions which have sought to enforce the oft-violated regulation requiring local board members "if at all practicable" to be residents of the board's jurisdictional area.

A review of the history of selective service law decisions by this court from 1946 to 1970 reflects an increasing recognition of the essential adversary and adjudicative character of local board classification action. Moreover, a number of decisions of lower federal courts have specifically commented on the unfairness of subjecting registrants without counsel to this adjudicative process.

It is an axiom of administrative law that certain minimum standards of due process must be met where an agency adjudicates personal and property rights. It is no less axiomatic that one of the most fundamental of these procedural due process safeguards is the right to be heard, in person, and to present evidence, and that such right is meaningless without the accompanying right to the presence, assistance and advice of counsel. This right has been recognized with respect to welfare termination hearings, non-criminal juvenile proceedings, deportation proceedings, parole revocation proceedings, license application and revocation proceedings, and a variety of other proceedings. It was specifically recognized for twenty years in many thousands of conscientious objector hearings before Department of Justice hearing officers.

Many federal agencies expressly recognize right of counsel by statute and/or regulation; a number do not appear to have any right to counsel regulations; but there is no

other agency with an express prohibition analogous to that of selective service.

There is no rational basis for justifying unique treatment for selective service personal appearances. The special treatment mythology which the agency has itself developed and fostered over the years should be recognized and ended.

Various decisions cited by the Government as supporting the denial of counsel are all distinguishable, many on the most obvious grounds, and none of them show any careful review of the constitutional question involved. This Court's decisions in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970), and *In re Gault,* 387 U.S. 1 (1966), which hold that there is a constitutional right to counsel under the due process clause in welfare and juvenile proceedings, are plainly and persuasively in point. On the other hand, *United States* v. *Nugent,* 346 U.S. 1 (1953), cited by the Government, is plainly not in point for a number of reasons, including principally the fact that it was not a right of counsel case since the registrant had counsel in the very proceeding involved in that case. Other cases cited by the Government are also inapplicable because they involved non-final, non-adversary, non-adjudicatory proceedings which this Court has always held do not require the same due process rights as adversary proceedings which adjudicate personal and property rights. See *Hannah* v. *Larche,* 363 U.S. 420 (1960).

In addition to the argument based on Fifth Amendment due process, appellee contends that there is a right to counsel under this Court's interpretation of the Sixth Amendment's right to counsel at every critical stage of the pretrial events. It is virtually inevitable that a conscientious objector applicant whose claim has been denied will refuse induction and be required to seek judicial review by means

of defense to a prosecution for induction refusal. This, combined with the exceedingly narrow scope of judicial review, makes the local board personal appearance a critical stage of the proceedings. Unless the right to counsel is afforded at this critical stage it may well be useless at the trial.

Many of the catalogued abuses of registrants' rights which have occurred, either innocently or non-innocently, might well have been prevented if registrants were permitted to be accompanied by counsel. Counsel's role of delineating the issues, assisting in fact presentation, and safeguarding the registrant's interest would be essentially the same as that contemplated by this Court for counsel for welfare recipients in *Goldberg* v. *Kelly, supra.* There is no reason to fear litigious interruption or delay and, in any event, the size of the local boards can be increased to cope with any increase in activity. Moreover, it can be expected that counsel's presence will be useful to the agency as well as to the registrant. Government Appeal Agents, subject to serious conflict of interest, and optional advisors to registrants have demonstrably not satisfied the registrants' needs or their constitutional rights for a number of reasons, of which the principal one is their unavailability. Private counsel, experienced in selective service law, are available. Free legal services are available for indigent registrants both from publicly-funded legal service offices and from privately organized panels.

POINT I

The exclusive jurisdiction of this Court to hear this direct appeal is explicitly mandated by both the motion in bar and statutory construction provisions of 18 U.S.C. §3731, the Criminal Appeals Act.

The Appellee, defendant below, moved in the district court to dismiss the indictment prior to trial on several grounds. It was contended by the defendant that the Selective Service regulation barring attorneys at personal appearances before a local board [32 C.F.R. 1624.1(b)] was either a denial of his constitutional rights or was unauthorized by the provisions of the Military Selective Service Act of 1967 (A. 3-4). After hearing the arguments of counsel, considering legal memoranda, and reading defendant's entire Selective Service file, the district court dismissed the indictment, holding as follows:

> "Accordingly this court is loath to hold that the administrative denial of such a right is either authorized by Congress or is constitutional" (A. 42).

Following the order of the district court, the Government filed its notice of appeal to this Court pursuant to the Criminal Appeals Act, 18 U.S.C. §3731, on the grounds that authority for direct appeal attached thereunder (A. 43). The Government then changed its mind with respect to the basis of the jurisdiction of this Court and on January 16, 1970 moved to remand the case to the Court of Appeals for the Ninth Circuit. On March 23, 1970 this Court denied the Government's motion to remand and further consideration of the jurisdictional question was postponed to the hearing of the case on the merits. —— U.S. —— (A. 44).

1. ***The Ruling of the Court Below Which Dismissed the Indictment Prior to Trial, Ending the Cause and Exculpating the Defendant on the Basis of Questions of Law Outside of the General Issue to Be Tried, Is a Motion in Bar for the Purposes of the Criminal Appeals Act.***

In claiming that the Criminal Appeals Act does not confer direct jurisdiction upon this Court, the United States is asking the Supreme Court to adopt the proposition that the motion in bar provision is limited to its common law scope (Government's Brief, pp. 6, 14). This Court has never accepted that approach. See *United States* v. *Sisson*, —— U.S. ——, 38 U.S.L.W. 4616, dissenting opinion of Mr. Justice White, at 4635. Contrary to the Government's contention, this Court on several occasions has held that where the dismissal of an indictment by its own force would end the cause and exculpate the defendant without subjecting him to double jeopardy, the requisites of a motion in bar for purposes of the Criminal Appeals Act have been met. In other words, it is the effect of the ruling below—and not of how the pleading is styled—that is of consequence. So long as the ruling below has the effect of an absolute bar to further prosecution without subjecting the defendant to double jeopardy, that ruling constitutes a motion in bar and is directly reviewable in the Supreme Court. See *United States* v. *Hark*, 320 U.S. 531, 535-36 (1944); *United States* v. *Murdock*, 284 U.S. 141 (1931); *United States* v. *Oppenheimer*, 242 U.S. 85 (1916); *United States* v. *Celestine*, 215 U.S. 278 (1909); *United States* v. *Goldman*, 277 U.S. 229, 236-37 (1928); *United States* v. *Rabinowich*, 238 U.S. 78 (1915); *United States* v. *Blue*, 384 U.S. 251 (1966); *United States* v. *Covington*, 395 U.S. 57 (1969). See also *United States* v. *Fix*, —— F.2d ——, No. 25216 (U.S. Court of Appeals, 9th Circuit, July 1,

1970); Friedenthal, Government Appeals in Federal Criminal Cases, 12 Stan. L. Rev. 71, 77-78 (1959).

Since the appellee had not yet been brought to trial when dismissal occurred, there can be no question of double jeopardy. See *United States* v. *Celestine, supra.* Undoubtedly, the effect of the district court's ruling was to end the cause permanently and exculpate the defendant. Thus, pursuant to the above cited decisions of this Court, jurisdiction under the Criminal Appeals Act is secure.

Contrary to the contentions of the United States, the legislative history of the Criminal Appeals Act supports this interpretation rather than that proposed by the Government of limiting the motion in bar provisions to its common law ambit. For example, Senator Knox, a former Attorney General, stated as follows:

> "The Government takes the risks of all the mistakes of its prosecuting officers and of the trial judge in the trial, and it is only proposed to give it an appeal upon questions of law raised by the defendant to defeat the trial and if it defeats the trial."

41 Cong. Rec. 2752 (1907).

Furthermore, Senator Patterson, one of the sponsors of the Act, defined a special plea in bar as follows:

> "A special plea in bar . . . is a plea that does not relate to the guilt or innocence of the defendant in the sense as to whether he did or not commit the act for which he was indicted. A special plea in bar is that which is set up as a special defense notwithstanding the defendant may be guilty of the offenses with which he is charged; it is for some outside matter; yet it may have been connected with the case."

41 Cong. Rec. 2753 (1907).

It is obvious from these remarks that the framers of the Criminal Appeals Act intended a case such as this one to be included within the motion in bar provisions. The questions of law raised by appellee prior to the trial defeated the trial and were based upon matters unrelated to his refusal to report for induction, the offense for which he was indicted.

Moreover, jurisdiction in this case obtains under the motion in bar provision even under its most restrictive reading. This interpretation was set forth by the dissenters in *United States* v. *Mersky*, 361 U.S. 431, 457 (1960). Mr. Justice Stewart, joined by Mr. Justice Frankfurter and Mr. Justice Harlan,[1] stated that a motion in bar was identical to the common law plea in confession and avoidance:

> "The plea in confession and avoidance did not contest the facts alleged in the declaration, but relied on new matter which would deprive those facts of their ordinary legal effect. • • • It set up affirmative defenses which would bar the prosecution."

361 U.S. at 457.

It is only by strained and convoluted argument that the Government contends that the motion and ruling below fails to fall within this definition. It is clear that the question of law raised by the motion and by the ruling of the district court did not appear on the face of the indict-

[1] Mr. Justice Harlan delivered the opinions of the court in *United States* v. *Blue*, *supra*, and *United States* v. *Covington*, *supra*, both post-*Mersky* decisions, which upheld direct appellate jurisdiction.

ment and that "new matter" was relied upon, *United States* v. *Blue, supra,* at 254, which insulated the appellee's refusal to report for induction from its ordinary legal effect. The position taken by the appellee was that he "confessed," that he did not submit to induction, but that he sought to "avoid" that as an act for which he could be prosecuted by "relying on new matter which would deprive these facts of their ordinary legal effect." *Mersky, supra,* at 457.

Unlike the defendant in *Sisson, supra,* however, the "new matter" relied on by the appellee in this case, and raised by his motion, did not consist of facts which would necessarily be tried with the general issue in this case. The primary elements of the offense of a refusal to submit to induction are refusing to step forward when one's name is called the third time and having the required criminal intent. See *Chernekoff* v. *United States,* 219 F.2d 721 (9th Cir. 1955); *United States* v. *Rabb,* 394 F.2d 230 (3d Cir. 1968). The crux of the prosecution's case when the crime alleged is induction refusal is simply whether or not the defendant has wilfully refused to submit to induction. The courts have consistently held that a presumption of regularity attaches to the official acts of local boards, which, standing alone, is sufficient to uphold a conviction for induction refusal. See *Yates* v. *United States,* 404 F.2d 462 (1st Cir. 1968), *cert. denied* 395 U.S. 925 (1969); *United States* v. *Weersing,* 415 F.2d 130 (9th Cir. 1969), *cert. denied* 396 U.S. 987 (1970); *United States* v. *Norman,* 413 F.2d 789 (6th Cir. 1969), *cert. denied* 396 U.S. 1018 (1970); *Little* v. *United States,* 409 F.2d 1343 (10th Cir. 1969); *United States* v. *Sandbank,* 403 F.2d 38 (2d Cir. 1968), *cert. denied* 394 U.S. 961 (1969); *Lowe* v. *United States,* 389 F.2d 51 (5th Cir. 1968).

It is completely incongruous for the United States, in the light of all these holdings and of the consistent posture which it takes in the prosecution of Selective Service cases,[2] to now argue that the propriety of a Selective Service regulation barring counsel is a "fact" which would be presented to the jury in trying the general issue. Thus, the motion below and the ruling of the district court qualify as a motion in bar for the purposes of the Criminal Appeals Act, no matter which interpretation is given to that provision.

The Government's arguments in this case seeking to take this ruling out of the jurisdiction of this Court make the comments of Mr. Justice Brennan, concurring in *United States* v. *Mersky, supra,* appropriate here. To adhere to the contentions put forward by the Government would "unsettle what has been settled by [the Supreme Court's] precedents and re-introduce[s] archaisms into federal criminal procedure . . ." *United States* v. *Mersky, supra,* at 441.

2. *The Decision of the District Court Dismissing the Indictment Is Based Upon the Construction of the Statute Upon Which the Indictment Is Founded and Also Confers Jurisdiction in This Court Upon Direct Appeal.*

In addition to the clear jurisdiction of the Court under the motion in bar section of the Criminal Appeals Act, it is also plain that the decision below is based upon the construction of the statute upon which the indictment is founded, and for that reason as well the Supreme Court has jurisdiction on direct appeal.

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[2] The guidebook published by the Selective Service System to aid prosecutors states that the Government's case "is satisfied by proof that an order to report for induction was issued and the registrant failed to comply." L. HERSHEY, LEGAL ASPECTS OF SELECTIVE SERVICE, 54-55 (Rev'd ed. 1969).

In *United States* v. *Mersky, supra,* this Court held that the construction of a regulation promulgated under a statute is a construction of the statute for the purposes of the Criminal Appeals Act. In so holding, the Court said:

> "Here the statute is not complete by itself, since it merely declares the range of its operation and leaves to its progeny the means to be utilized in the effectuation of its command. • • • The result is that neither the statute nor the regulations are complete without the other, and only together do they have any force. In effect, therefore, the construction of one necessarily involves the construction of the other." 361 U.S. at 437-438.

The present case involves a very similar statutory scheme to that considered in *Mersky.* The following provisions of the Military Selective Service Act authorizing the President to promulgate rules and regulations under that Act illustrate the close nexus between the Act and the regulations promulgated thereunder:

> "The President is authorized, from time to time, whether or not a state of war exists, to select and induct into the Armed Forces of the United States for training and service in the manner provided in this title • • • such number of persons as may be required to provide and maintain the strength of the Armed Forces." 50 U.S.C. App. §454(a).

> "The selection of persons for training and service under section 4 • • • shall be made in an impartial manner, under such rules and regulations as the President may prescribe, • • •" 50 U.S.C. App. §455(a)(1).

"The President is authorized—

(1) to prescribe the necessary rules and regulations to carry out the provisions of this title." 50 U.S.C. App. §460(b)(1).

. . . .

(3) * * * Such local boards, or separate panels thereof each consisting of three or more members, shall, under rules and regulations prescribed by the President, have the power within the respective jurisdictions of such local boards to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title * * * of all individuals within the jurisdiction of such local boards." 50 U.S.C. App. §460(b)(3).

"Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title [sections 451, 453, 454, 455, 456 and 458-471 of this Appendix], or the rules or regulations made or directions given thereunder, who shall knowingly fail or neglect to perform such duty * * * shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment * * *" 50 U.S.C. App. §462(a).

Indeed, the indictment charging the appellee with an offense charged him with a wilful and knowing violation of both the Act "and the . . . regulations . . . duly made pur-

suant thereto" (A. 2). Thus, there is no question but that here, as in *Mersky,* the statute is not complete in and of itself but authorizes and in fact requires the promulgation of regulations to fill out its scheme. "When the statute and regulations are so inextricably intertwined, the dismissal must be held to involve construction of the statute." *Mersky, supra,* at 438.[3]

The court below, in applying the authorization test of *Greene* v. *McElroy,* 360 U.S. 474 (1959), analyzed the statutory and regulatory scheme (A. 12). The court first read the Act to search for an express authorization for the denial of the right to counsel (A. 13-14). It then reads the Act to try to find any express delegation of the power to do so (A. 14). It found none in the Act. It then analyzed the Act for possible sources of implicit delegation of such authority. It examined Section 1(c) [50 U.S.C. App. 451(c)] and Section 10(b)(3) [50 U.S.C. App. 460(b)(3)], construed them, and found that they are clearly "not 'explicit action by the Nation's lawmakers' (in this case Congress) taking the constitutionally-suspect action of removing the right to be represented by counsel" (A. 23). To view this analysis of the court below as anything other than a construction of the statute is to twist language beyond reason.

It is obvious that where, as here, the issue before the court is whether a regulation is authorized by a statute, the judicial determination of that question involves a construction of the statute and authorizes direct appeal under the Criminal Appeals Act. See *United States* v. *Foster,* 233 U.S. 515, 523 (1914); Kurland, *The Mersky Case and*

[3] Notwithstanding its position that statute and regulation are not "inextricably intertwined" in this case, earlier in the Government's brief the combination of statute and regulation is without much ado characterized as "part of the Selective Service law," p. 5.

the Criminal Appeals Act: A Suggestion for Amendment to the Statute, 28 U. Chi. L. Rev. 419 (1961); Friedenthal, *supra.*

Obviously, the purposes of the Criminal Appeals Act are equally well served when a court declares a regulation invalid as unauthorized by a statute as when a court construes the statute directly. As this Court stated in *United States* v. *Mersky*:

> "It therefore appears abundantly clear that the remedial purpose of the Act was to avert 'the danger of frequent conflicts, real or apparent, in the decisions of the various district or circuit courts, and the unfortunate results thereof'; and to eliminate 'the impossibility of the government's obtaining final and uniform rulings by recourse to a higher court.' 20 Harv. L. Rev. 219. Moreover, the desirability of expedition in the determination of the validity of acts of Congress, which is pointed to as a desideratum for direct appeal, *applies equally to regulations.* In practical operation, correction of a regulation by agency revision invariably awaits judicial action." *Supra,* at 436 (emphasis added).

The Government's attempt to distinguish this case from *United States* v. *Eisdorfer,* No. 330, 1969 Term, appeal dismissed, 396 U.S. 1066 (1970), and from the positions taken therein both by the Government and by the Court, is unpersuasive. The Government concedes that to apply the *Eisdorfer* rationale here

> ". . . it is necessary to argue that the issue of the legality of appellee's classification, which goes to the validity of the order to report, is encompassed in the charge of disobedience to the order and that the regulation bearing upon the process by which the local board

determines the classification in turn conditions the validity of the classification." Brief, p. 19.

Further, it is conceded (p. 19) that the district court was justified in dismissing the indictment (once it found that the process leading to the order to report for induction was invalid). Yet the Government suggests that the dismissal was not based on a finding that the induction order was void. It seems to suggest that the decision of the court below should be read as holding that in some metaphysical sense the order to report for induction was valid, and that nevertheless the registrant could not be prosecuted for wilful disobedience of it. Even if this theory were conceptually valid, it is an analysis which would put the case squarely back in the "confession and avoidance" category as a motion in bar.

In conclusion, the exclusive jurisdiction of this Court upon direct appeal, pursuant to the Criminal Appeals Act, is clearly mandated in both the motion in bar provision and the statutory construction provision. This is evident not only from the foregoing analysis, but from a consideration of the broad statutory purpose of allowing a direct appeal to this Court from decisions of district courts which dismiss indictments because of major constitutional questions in the construction of the statute. See *United States* v. *Sisson, supra.* The purpose was to bring such decisions of national impact directly to this Court for review by the highest constitutional authority.[4] The decision below, holding that

[4] "Appeal was to be for the purpose of deciding 'constitutional questions', 'questions of law' which if the district judge's decisions were permitted to stand could lead to conflict and different treatment under the same criminal statutes in different parts of the country." *United States* v. *Sisson, supra,* 38 U.S.L.W. at 4631 (dissenting opinion of Mr. Chief Justice Burger).

a thirty-year old "part of the Selective Service law," Government's Brief, p. 5, whose continuation, we are urged, is necessary to avoid "constructive paralysis" (p. 46) of the system, was invalid on constitutional grounds, is plainly that kind of decision.

POINT II

The selective service regulation which prohibits the presence of counsel at a local board personal appearance is invalid because it is a denial of a traditional procedural safeguard which was not explicitly authorized by Congress.

1. *Only Congress Has the Power to Conscript Armies and to Limit the Procedural Rights of Selective Service Registrants.*

The essence of the decision of the court below is that:

> "... nowhere in the Act has Congress expressly denied the right to counsel or expressly delegated the power to do so to the President" (A. 33).

Following *Greene* v. *McElroy*, 360 U.S. 474 (1959), the district court held that the statutory provisions which authorize presidential regulation of local boards

> "... clearly are not 'explicit action by the Nation's lawmakers' (in this case, Congress) taking the constitutionally-suspect action of removing the right to be represented by counsel" (A. 33).

The premises underlying the court's holding are that only Congress can declare war, Constitution, Article I, §8; and only Congress can draft manpower. Consequently,

only Congress can declare that a selective service registrant shall be denied counsel. These self-evident constitutional axioms are, however, questioned by the Government (Brief, p. 22, n. 7). The incredible suggestion is made—without any citation of authority—that the President himself has power under Article II, §2, of the Constitution—even without congressional authorization—to deny traditional safeguards to selective service registrants.[5]

The Government superimposes upon this argument of limitless presidential power the contention that the exercise of such power is unreviewable, since it presents "nonjusticiable controversies of a political nature . . . ."[6]

With all due respect, the Solicitor General is wrong on both grounds. This Court has on many occasions reiterated that there are constitutional limits on the President's exercise of military powers, even in wartime. See *Youngstown Sheet and Tube Co.* v. *Sawyer,* 343 U.S. 579 (1952);

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[5] The implication of the Government's argument in footnote 7 of its brief is that the President has power—without congressional authorization or sanction—to promulgate regulations which would provide for conscription of manpower without any personal appearances at all, and without any procedural safeguards whatsoever. It is not clear if the Government's argument runs so far as to claim exclusive presidential power—without congressional authorization—to draft manpower, or even to use his powers as commander-in-chief of the armed forces to raise an army whenever and however he deems it appropriate.

[6] The only authority cited for this dubious proposition is this Court's denial of certiorari in *Mora* v. *McNamara,* 389 U.S. 934 (1967). It is surprising to find the Solicitor General imputing substantive significance to a denial of certiorari in the light of the repeated admonitions by this Court that such a denial "imports no expression of opinion upon the merits of the case, as the bar has been told many times." *United States* v. *Carver,* 260 U.S. 482, 490 (1923). See *Maryland* v. *Baltimore Radio Show,* 338 U.S. 912, 917-920 (1950); Stern & Gressman, *Supreme Court Practice,* 213-218 (1969).

United States v. *Robel*, 389 U.S. 258, 263 (1967); *Galvan* v. *Press*, 347 U.S. 522, 530 (1954); *Ex parte Endo*, 323 U.S. 283 (1944). Moreover, the "political question" spectre has been decisively exorcised. See *Baker* v. *Carr*, 369 U.S. 186 (1962); *Powell* v. *McCormack*, 395 U.S. 486 (1969); compare *Berk* v. *Laird*, —— F.2d ——, 3 S.S.L.R. 3142 (2d Cir. 1970).

2. *The Court Below Correctly Applied the Requirement of Explicit Authorization.*

The court below correctly applied *Greene* v. *McElroy*, *supra*, to reach its decision that the regulation prohibiting counsel was never authorized by Act of Congress (A. 33-34). This Court held in *Greene* that the requirement of explicit congressional authorization before any denial of a procedural safeguard is constitutionally tolerable is necessary because:

> "Without explicit action by lawmakers, decisions of great constitutional import and effect would be relegated by default to administrators who, under our system of government, are not endowed with authority to decide them." 360 U.S. at 507.[7]

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[7] It is, therefore, difficult to understand how the Government reads *Greene* v. *McElroy* as holding that a denial could be legitimatized "either by direct action or by careful and purposeful inaction" (p. 22). Nowhere does the phrase "careful and purposeful inaction" appear in the cited pages of *Greene* v. *McElroy*, 360 U.S. at 506-507. The phrase which this Court did use was "careful and purposeful consideration" as a concomitant of "explicit action." This court specifically held that "such decisions cannot be assumed by acquiescence or non-action." *Ibid.* It is a mystery, to say the least, how the authors of the Solicitor General's brief can so nimbly convert "inaction" into its opposite. That this Court meant what it said when it required "explicit action" is further demonstrated by the very sharp dissenting opinion of Mr. Justice Clark, 360 U.S. at 510-524. Pointing to the many instances of congressional consideration and review of the personnel security program in-

This Court's decision in *Greene* was not a biological sport, but merely a continuation of a well-established doctrine requiring express congressional approval as a precondition for denial of procedural rights. See *Panama Refining Company* v. *Ryan,* 293 U.S. 388, 418 (1935) (regulation invalid because "The Congress left the matter to the President without standard or rule, to be dealt with as he pleased."); *Ex parte Endo,* 323 U.S. 283, 300 (1944) ("We must assume, when asked to find implied powers in a grant of legislative or executive authority, that the lawmakers intended to place no greater restraint on the citizen than was clearly and unmistakably indicated by the language they used."); *Kent* v. *Dulles,* 357 U.S. 116, 129 (1958) ("We hesitate to find in this broad generalized power an authority to trench so heavily on the rights of the citizen."); *Schneider* v. *Smith,* 390 U.S. 17 (1968); see also *Gonzalez* v. *Freeman,* 334 F.2d 570, 579 (D.C. Cir. 1964).[8]

The most recent application by this Court of the *Greene* doctrine occurred in *Gutknecht* v. *United States,* 396 U.S. 295 (1970), where a selective service regulation which denied procedural safeguards was held invalid because of the absence of explicit congressional authorization. In *Gutknecht,* however, the proponents of the Government's position could and did argue that there was some explicit congressional authorization evidenced by the use of the

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volved in the *Greene* case, and particularly the publication by Congress of all of the regulations in an official directory, Mr. Justice Clark wrote "In other cases we have held that the inaction of the Congress, in circumstances much less specific than here, was a clear ratification of a program as it was then being carried out by the Executive." *Id.* at 523.

[8] In *Gonzalez, supra,* then Circuit Judge Burger held that in the absence of specific legislative authority, a statute would not be read to authorize debarment of a Government contractor without regulations establishing safeguards and a basically fair procedure.

word "delinquent" in the statute. In this case, *a fortiori,* there is not a single word in the statute which suggests explicit authorization of the prohibition of counsel.

3. *Congressional Inaction Does Not Provide the Required Authorization.*

The Government next suggests (Brief, p. 23) that this Court modified the *Greene* v. *McElroy* rule of explicit authorization by its decision one year later in *Hannah* v. *Larche,* 363 U.S. 420 (1960). But a reading of *Hannah* gives no support to the Government's desire that "purposeful inaction" be deemed synonymous with "explicit authorization". This Court in *Hannah* was not faced with the problem of finding explicit authorization for a regulation restricting traditional safeguards at adjudicatory proceedings. First, as the Court determined, the proceedings of the Civil Rights Commission in *Hannah* did not involve the adjudication of personal and property rights. 363 U.S. at 441. See discussion in Point III *infra,* pp. 37-45. Second, in *Hannah* it was abundantly evident that there were two discrete and contradictory legislative proposals before Congress, each of which explicitly dealt with the procedures to be followed by the Civil Rights Commission. Although both proposals allowed right of counsel and certain other fundamental procedural rights, that which was rejected by Congress allowed greater scope to the right of counsel and broader procedural rights to witnesses called before the Commission. This Court found that Congress explicitly rejected the broader proposal and explicitly accepted the narrower proposal. *Hannah* v. *Larche,* 363 U.S. at 431-437.

The situation in this case is vastly different. There is no mention in the statute of a limited right of counsel as

was the case in *Hannah*. There is not even the tangential use of the word "counsel" in any context relating to a personal appearance. Compare *Gutknecht* v. *United States, supra*. Much less is there here any express authorization to the President to promulgate a regulation denying counsel, or limiting the right of counsel, or authorizing the President to grant or deny counsel in his discretion. As we set forth below, the legislative history evinces considerable confusion with regard to the role of the government appeal agent and the advisor to registrants, and to related selective service procedures. On the other hand, in the adoption of this very same statute, the Military Selective Service Act of 1967, Congress knew how to legislate an express prohibition of that which it feared might cause "litigious interruption," and indeed did so in the amendment of Section 10(b)(3) of the Act, 50 U.S.C. App. §460(b)(3), so as to limit judicial review of local board classifications and processing.[9]

4. *The Argument of Congressional Acquiescence Is Not Persuasive.*

Finally, the Government argues that the regulation should be held valid, even if not explicitly authorized, because of what it regards as long congressional acquiescence. Brief, pp. 23-25. A number of cases are cited os-

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[9] "Expressio unius est exclusio alterius." See *Hunt Foods and Industries, Inc.* v. *F.T.C.*, 286 F.2d 803, 807 (9th Cir. 1961), *cert. denied* 365 U.S. 877 (1961). In totally ignoring the obvious implications to be drawn from the very words of the statute, the Government has failed to take account even of the language of Mr. Justice Reed, in *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 542 (1940): "There is, of course, no more persuasive evidence of the purpose of a statute than the words by which the legislature undertook to give expression to its wishes."

tensibly in support of this proposition.[10] To begin with, this Court specifically refused to follow the argument of acquiescence in *Greene* v. *McElroy*, 360 U.S. at 506-507. See also *Ex parte Endo, supra; Kent* v. *Dulles, supra.* Just this past term, in *Toussie* v. *United States*, 396 U.S. 875, 25 L. Ed.2d 156 (1970), this Court was urged to find that failure to register was a continuing offense because Congress had repeatedly re-enacted selective service acts, often with substantive changes, but had taken no action to repudiate the long-standing administrative and judicial construction. The Court nevertheless refused to find requisite congressional approval, since this could be found only in "explicit language of the substantive criminal statute." 25 L. Ed.2d at 161.

The teaching of *Girouard* v. *United States*, 328 U.S. 61, 69-70 (1946) is most applicable.

> "It is at best treacherous to find in Congressional silence alone the adoption of a controlling rule of law .... The silence of Congress and its inaction are as consistent with a desire to leave the problem fluid as they are with an adoption by silence ...."

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[10] All of the cases cited by the Government (p. 25) are subject to the analysis in 2 Sutherland, *Statutes and Statutory Construction*, §5107 (3rd ed. 1943), likewise cited by the Government, that the theory of "long-standing interpretation" will be followed where "... reliance has been placed thereon by the public and those having an interest in the interpretation of the laws." *Ibid.* It is thus significant that most of the cases cited by the Government, and most other cases which have applied this theory, have dealt with tax or other fiscal regulations where private individuals are most likely to have made decisions of great importance in reliance on a continuing interpretation of a governmental regulation. In the lone selective service case cited, *Billings* v. *Truesdell*, 321 U.S. 542 (1944), the theory of long-standing interpretation was invoked in favor of a private individual and against the Government.

5. *The Legislative History of the 1967 Act Is at Best Ambiguous.*

The legislative history of the 1967 Act, cited extensively by the Government at pp. 25-31 of its brief, is not nearly so persuasive as the Government would have one believe. Much is made (pp. 25-29) of the testimony of General Hershey before the House Armed Services Committee, in response to various criticisms of selective service procedures, including the denial of the right to counsel. (*Review of the Administration and Operation of the Selective Service System,* Hearings before the Committee on Armed Services of the House of Representatives, 89th Cong., 2d Sess., June 22, 23, 24, 28, 29, and 30, 1966 (Doc. No. 75), pp. 9984-9995.) The Government neglects to mention, however, that in its *subsequent* Interim Report (*Review of the Administration and Operation of the Selective Service System,* An Interim Report of the Committee on Armed Services of the House of Representatives, 89th Cong., 2d Sess., August 4, 1966 (Doc. No. 76), hereinafter "Interim Report"), after noting the objections which had been raised to existing administrative procedures, and General Hershey's replies to those objections[11] (Interim Report, pp. 10177-10189), the Committee most explicitly stated: "However, the analysis of General Hershey by no means necessarily reflects the views or conclusions of the Committee on Armed Services" (Interim Report, p. 10190). Such an explicit disclaimer of intent to adopt the views expressed by General Hershey on the question of selective service proce-

[11] At these same hearings, General Hershey explained his resistance to any change in the statute:

> "You can do almost anything under this law, which is more than you can say for a great many laws that are on the books." *Id.* at 9698.

dures, of course, very seriously weakens any presumption that the Committee's failure to introduce an amendment in favor of permitting counsel should be construed as a positive approval of the denial of counsel. Here, as in *Girouard, supra,* one might readily conclude that at most the desire of the Committee was to "leave the problem fluid." 328 U.S. at 70.

The Government also offers, in support of its interpretation of the legislative history of the statute, a substantial amount of material from the floor debates in both the House and the Senate. But there is little in it to support the Government's contention that it demonstrates an explicit congressional intent to permit denial of counsel. How the criticisms by Rep. Kastenmeier of the procedures before *appeal* boards (emphasis in Government's Brief at p. 28) can be deemed even to have informed the members of the House of the lack of counsel at *local* boards, let alone to have demonstrated House approval of the procedure, is not explained by the Government for there is no way it can be explained.[12]

The Government also places great reliance on the defeat of the amendment offered by Senator Morse, on the floor of the Senate, which would have permitted counsel to registrants in personal appearances. An examination of the debate which preceded the vote on this amendment, how-

[12] Rep. Kastenmeier's apparent effort was to open up appeal board proceedings to allow presence of registrant and counsel. Indeed, so far as appeal boards are concerned, the registrant has now, and had in 1967, the right to submit in writing any document which he desires to submit, including, if he wishes, memoranda or other writings by counsel. Government's Brief, p. 41, n. 28. Thus, since the registrant himself does not personally appear before the appeal board, but is limited to the submission of written materials, the registrant has the right to counsel to the full extent of his contact with the appeal board.

ever, provides a most illustrative example of the dangers of which Mr. Justice Jackson was speaking when he issued his *caveat* about floor debates in *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 396 (1951) (concurring opinion), that they are "not always distinguished for candor or accuracy."[13] Thus, Senator Morse made the argument that counsel was required because " . . . [T]he appeals officer does not represent the registrant. He represents the board. As I stated in my main remarks, we cannot justify having a prosecutor serve also as an attorney for the defendant." 113 Cong. Rec. 12503. In reply, Senator Richard Russell, Chairman of the Senate Committee on Armed Services, stated:

> "I understood [Senator Morse] to say that it would be the same person in both cases. That is not so. The appeals agent does not represent both the board and the registrant in the same proceeding.
>
> "There is a counsel for the registrant, and the appeals board has an appeals agent in addition. They are not one and the same person." *Ibid.*

The statements of Senator Russell, quoted above, are in direct contradiction to the provisions of 32 CFR §1604.71 (d)(4) and (5), which require the appeals agent to render assistance to the local board and to be "equally diligent in protecting the interests of the Government and the rights of the registrant in all matters." Senator Russell was also obviously confused and in error in his perception of the availability of "a counsel for the registrant." See

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[13] Mr. Justice Jackson argued persuasively that "resort to legislative history is only justified where the face of the Act is inescapably ambiguous . . . . Moreover, it is only the words of the bill that have presidential approval, where that approval is given. It is not to be supposed that in signing a bill the President endorses the whole Congressional Record . . . ." 341 U.S. at 396.

discussion of *optional* advisors to registrant and of divided responsibility of appeal agents, *infra*, pp. 93-97.[14]

This is only one of several misstatements occurring in the debate on Senator Morse's proposed amendment.[15] The

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[14] Senator Russell's statement that "There is a counsel for the registrant" may suggest that the proper interpretation of the Senate's action is that suggested at 2 Sutherland, *Statutes and Statutory Construction*, §5015 (3d ed. 1943): ". . . [S]uch rejection may occur because the bill in substance already includes those provisions. Other interpretive aids may indicate that this is the case."

[15] (1) Senator Russell stated that the only question involved was whether a lawyer "should be permitted to go into the local selective service board when they are making their classifications." This is inaccurate, since appellee does not question the power of a local board to engage in its deliberations in executive session. The question of counsel involves presence with the registrant while the registrant's case is being presented to the board in an attempt to persuade the board to adjudicate in the registrant's favor. (2) Senator Holland, who actively participated in the debate, was under the mistaken impression that there is "always an appeal to the selective service head in the state." If the Senator was referring to the state appeal board, this is indeed true, provided that the registrant files a notice of appeal within thirty days of the prior classification action. 32 CFR §1626.2. But if the Senator was referring to an application for the discretionary exercise of power by the state director of selective service, this is clearly discretionary. 32 CFR §1626.1. (3) Senator Holland was, likewise, under the mistaken belief that allowing counsel would subject the board to lawyers' arguments "before there were decisions from the local boards . . . ." This betrays a fundamental misconception of the function of the personal appearance. A personal appearance does not occur, and cannot occur, until after the local board has already made its classification decision. See Point III, §1, *infra*. (4) Finally, Senator Ervin was under the mistaken impression that a lawyer's services were already available under existing law, with the sole exception that "they just don't let him make an oral argument." There was no recognition by Senator Ervin that a lawyer could not even be admitted for the limited purposes of rendering advice, which is allowed before the Civil Rights Commission, see *Hannah* v. *Larche*, *supra*, and no recognition that a lawyer's function at a personal appearance might be more than that of oral argument, but would include assistance in fact presentation and insistence on the regularity of procedures. See Point III, §4, *infra*.

cumulative effect of the confusion and misunderstanding casts the most serious doubt on any contention that the defeat of the amendment may be taken as demonstrating an informed intent in Congress to ratify the regulation's denial of counsel.

Finally, the Government seeks to show from the removal of the restrictions on Reserve personnel serving as Appeal Agents (Brief at pp. 31-32) that Congress sought to meet, "from within the Selective Service System itself, the recognized needs of registrants for legal advice and assistance . . . " But, in view of the serious confusion over the status and duties of the appeal agent introduced into the floor debate by the material quoted above, and the House Armed Services Committee's express rejection of the views of General Hershey on the necessity or advisability of permitting counsel (*Interim Report, supra*), it can hardly be said that an explicit position on the denial of counsel was here taken by Congress. Relying, as it does, on other aspects of the legislative history to lend support to the latter contention, it is clear that the Government's argument here is of the very weakest nature. "These slender threads of legislative comment simply cannot be woven into a conclusion of legislative sanction." *Dandridge* v. *Williams,* 397 U.S. 471 (1970) (dissenting opinion).

To conclude this point, the Government's argument in opposition to the eminently sound decision of the court below begins with a misreading of the explicit authorization requirement of *Greene* v. *McElroy;* proceeds to a misunderstanding of the holding of *Hannah* v. *Larche;* and overlooks the sharp limits which have been placed on the doctrine of legislative acquiescence. The Government's belabored argument of legislative history shows simply that

General Hershey had sharp views on the question, which were officially disclaimed by the House Committee; that the only debate in the House concerned appeal hearings; that the Senate debate over the Morse amendment was so thoroughly confused that it cannot fairly be said that any of the Senators accurately knew what existing regulations provided. This is obviously leagues away from the explicit authorization upon which this Court has insisted before tolerating the divesting of a fundamental right of constitutional dimension.

POINT III

A Selective Service registrant has a constitutional right to counsel at a local board personal appearance.

1. ***A Registrant's Personal Appearance at a Local Board Is an Adjudicative Hearing Affecting Substantial Rights.***

a. Nature of the Personal Appearance:

(1) A personal appearance in selective service law is a specific and discrete proceeding. It is a matter of right. Section 1624.1 of the selective service regulations, 32 C.F.R. §1624.1, grants to the registrant an unequivocal right to a personal appearance after classification action has been taken by the local board, so long as the registrant makes a written request for the personal appearance within thirty days of the notification to him by the board of the classification action. Thus, the structure of the personal appearance is such that it subsumes dissatisfaction with the classification action, and provides a formal method before the tribunal of first instance, the local board, to effect a change in the classification. Following the personal appearance, the local board is charged with the respon-

sibility of considering the evidence, documentary and otherwise, which the registrant presented to it and determining whether it should adhere to its prior classification decision or whether the registrant's contentions that the classification should be changed should prevail. 32 C.F.R. §1624.2.

(2) An analysis of the various types of classification decisions which local boards make demonstrates that insofar as concerns a dissatisfied selective service registrant, the local board determines questions of fact and law, and exercises discretion, with the same force and effect, and in much the same manner, as any other administrative agency performing an adjudicative function.[16] A review of the classifications provided by statute and regulation reveals an enormous array of findings of fact, conclusions of law, and exercises of discretion in which a local board must perforce engage to fulfill its statutory function "to hear and determine . . . all questions or claims with respect to inclusion . . . exemption or deferment. . . ." Military Selective Service Act of 1967 (hereinafter "Act"), §10(b)(3); 50 U.S.C. App. §460(b)(3).

(a) *Conscientious Objectors.* The board must determine if an applicant is a conscientious objector to participation in war in any form and thus entitled to I-O classification, 32 C.F.R. §1622.14, or if his conscientious objection is limited to combatant service and training and he is thus entitled to I-A-O classification, 32 C.F.R. §1622.11; Act §6(j), 50 U.S.C. App. §456(j). In making this determination, the local boards must properly apply the legal standards of religious training and belief as determined by decisions of this

[16] See discussion of distinction between agency performing rule making function and agency performing adjudicative function, *infra*, pp. 56-57.

Court. See, e.g., *Welsh* v. *United States,* 398 U.S. 333 (1970); *Seeger* v. *United States,* 380 U.S. 163 (1965); *Sicurella* v. *United States,* 348 U.S. 385 (1955). It must determine if the applicant is conscientiously opposed to participation in all wars or whether he is a "selective" conscientious objector. See *United States* v. *Sisson,* 297 F. Supp. 902 (D. Mass. 1969), *appeal dismissed for lack of jurisdiction,* 399 U.S. 267 (1970); *Gillette* v. *United States,* 420 F.2d 298 (2d Cir. 1970), *cert. granted,* —— U.S. —— (1970). It must determine, in many instances, if the application of a claimant for conscientious objector status makes out a *prima facie* case. *Mulloy* v. *United States,* 398 U.S. 410 (1970). In the case of an application presented after an induction order, special rules must be applied in terms of the time and manner of maturation of the registrant's views. See *Gearey* v. *United States,* 368 F.2d 144 (2d Cir. 1966), *cert. denied,* 389 U.S. 959 (1967); *Ehlert* v. *United States,* 422 F.2d 332 (9th Cir. 1970), *cert. granted,* —— U.S. —— (1970). In making these determinations, a large number of questions of fact must be evaluated, such as the weight to be given possible factual inconsistencies. See *Witmer* v. *United States,* 348 U.S. 375 (1955). This Court has reiterated on many occasions that the most significant factual determination is whether the applicant is sincere. *Witmer* v. *United States, supra; Welsh* v. *United States, supra.* Sincerity is a question of fact which must be determined in every case. *United States* v. *Seeger,* 380 U.S. at 185.

(b) *Occupational Deferment.* Although the regulations have changed from time to time over the years, the essential determinant in applications for occupational deferment in Class II-A was whether the employment is in the national health, safety and interest. 32 C.F.R.

§1622.22. The definition of deferable employment contained in Section 1622.23 of the regulations reveals a large number of factual and mixed legal/factual determinations which the board must make. Section 1622.20(b) enjoins the board that occupational deferments cannot be granted on a mass basis, but only "upon the basis of the status of such individual."

(c) *Student Deferments.* Determination of whether a student is entitled to I-S classification as a "student deferred by statute," pursuant to Section 1622.15, is obviously a legal question. See *Marsano* v. *Laird,* 412 F.2d 65 (2d Cir. 1969); compare *Rich* v. *Hershey,* 408 F.2d 944 (10th Cir. 1969). Whether a student is entitled to a II-S classification involves determination of such questions as whether he has "requested" the deferment, whether he is "satisfactorily pursuing a full-time course of instruction," whether the institution which he attends is a "college, university or similar institution of learning," definition of the "academic year" in terms of fixing the date of "the beginning of his course of study," and whether satisfactory progress is being made towards his degree. Section 1622.25.

(d) *Hardship Deferments.* In the case of a registrant who seeks a III-A classification, the board must decide the mixed legal/factual question of whether his induction would result in "extreme hardship;" the factual questions of whether the allegedly dependent person is "physically or mentally handicapped" and whether the registrant has "assumed in good faith" the support of such dependent person; and in many instances whether a person claimed to be a "child" meets the proper definition in the regulations. Section 1622.30. See *United States* v. *Burlich,* 257 F. Supp. 906 (S.D.N.Y. 1966).

(e) *Other Classifications.* Similar determinations of factual and legal questions must be made by the board to determine if a registrant is entitled to a veteran's classification under Class IV-A, 32 C.F.R. §1622.40(a)(1)-(9); or whether the registrant is entitled to such classification as a "sole surviving son." Section 1622.40(a)(10). See *McKart* v. *United States,* 395 U.S. 185 (1969). Questions of law are essentially involved in determining whether a registrant is a public officer deferred by law (e.g. "judge of a court of record") under Section 1622.41. The same is true when the board must determine if a registrant is entitled to a IV-C classification as being in one of those categories of aliens who are not obligated to perform military service under the law. Section 1622.42(a), (b), (c), (d). Whether a registrant is entitled to a IV-D classification as a "regular minister of religion," a "duly ordained minister of religion," or a student "preparing for the ministry" who meets certain other requirements involves many questions of law and fact. Section 1622.43. See *Dickinson* v. *United States,* 346 U.S. 389 (1953); *Cox* v. *United States,* 332 U.S. 442 (1947).

(3) All of these questions and many others must be decided by the local board whose statutory task is "to hear and determine, subject to the right of appeal to the appeal boards herein authorized, all questions or claims with respect to inclusions for, or exemption or deferment from, training and service under this title, of all individuals within the jurisdiction of such local boards." Act, Section 10(b)(3); 50 U.S.C. App. §460(b)(3); 32 C.F.R. §1622.1(c); see §1622.20(a) ("On the local board is placed the responsibility, under applicable rules and regulations, of deciding which men should be deferred because of their civilian activities."). See Section 1624.2, paragraphs (b),

(d), and (e), each of which recognizes the hearing and determinative function of the local board.

This Court has explicitly recognized that the local board is an agency with "authority to hear and determine all questions of deferment or exemption." *Estep* v. *United States*, 327 U.S. 114, 120 (1946). It is argued *infra*, that where an administrative agency performs adjudicative functions with regard to personal or property rights, any hearing before it is an adversary proceeding. See *infra*, pp. 58-59. However, even on the most obvious level, determination that one registrant rather than another is to be unwillingly stripped of an occupational deferment clearly involves an adversary proceeding affecting his right to employment.[17] See *Truax* v. *Raich*, 239 U.S. 33 (1915); *Greene* v. *McElroy*, 360 U.S. 474 (1959). As Mr. Justice Brandeis pointed out in a case involving a determination as to which of two carriers would get a more favorable rate, "Every proceeding is adversary in substance if it may result in an order in favor of one carrier [registrant] as against another." *United States* v. *Abilene & So. Ry.*, 265 U.S. 274, 289 (1924).

b. Incidents of Personal Appearance.

The adjudicative and adversary character of a local board personal appearance is further demonstrated by the provision, in the selective service regulations, of a large number of features which customarily accompany adjudicative hearings before administrative agencies. The composition of the local board, 32 C.F.R. §1604.52; the circumstances under which a local board may be divided into

[17] It is the official position of the Selective Service System that "In determining deferment claims, its [the local board's] primary interest must be the national defense rather than the welfare or necessities of the registrant," L. HERSHEY, LEGAL ASPECTS OF SELECTIVE SERVICE 28 (Revised ed. 1969).

panels, §1604.52a; the jurisdiction of each local board, §1604.54; and the grounds of disqualification of local board members, §1604.55, are clearly delineated. Section 1604.57 mandates the administration of a specific oath to "every person testifying" before the local board. The oath refers specifically to the giving of "evidence" and designates the proceeding as a "hearing." The board is required to keep minutes, §1604.58. The board has subpoena power, §1621.15, under which it can require "any person" to appear before it, to produce papers and records, and to testify under oath, and compliance with the subpoena is enforceable in a United States court. See *Dickinson* v. *United States,* 346 U.S. at 396.[18] Section 1622.1(c) places the burden of proof upon the registrant: "Each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board."

c. Adjudicative Character of Local Board Function.

It is thus apparent that the local board hears and determines, Act §10(b)(3), just like any other administrative agency performing adjudicative functions. See, e.g., *West Ohio Gas Co.* v. *Public Utilities Company of Ohio,* 294 U.S. 63, 70 (1935) ("suitable opportunity through evidence and argument" to challenge a rate); *Londoner* v. *City of Denver,* 210 U.S. 373, 386 (1908) (tax assessment requires full and fair opportunity to be heard on objections, including oral argument and proof); *Hornsby* v. *Allen,* 326 F.2d 605, 608 (5th Cir. 1964) ("licensing consists in the

[18] Perhaps an even more compelling demonstration of the recognized adversary nature of board proceedings is the provision in §1613.14 which requires a selective service registration official to contest, contradict and report in writing answers to questions believed to be incorrect or false.

determination of factual issues and the application of legal criteria to them"). "No matter how this language is examined, 'hear and determine' has ordinarily and usually implied but one thing, where no qualifying language is explicitly used, namely, an adjudicative, judicial-type, trial proceeding, whether in the courts or administrative agencies." Forkosch, *The Constitutionality of the Vietnam Venture and a Registrant's Right to Counsel Within the Selective Service System,* 22 So. Car. L. Rev. 287, 326-328 (1970).

That the local board's classification process is one of fact finding, evaluation, and determination "analogous to what occurs in a court trial or administrative quasi-judicial type hearing," Forkosch, *supra,* at page 332, is revealed in a number of cases. Thus, one Court of Appeals, in discussing a local board's function in evaluating the sincerity of a conscientious objector, speaks of "best evidence," and of "credibility and demeanor," and recognizes the board as "the fact finding agency." *United States* v. *Simmons,* 213 F.2d 901, 904 (7th Cir. 1954), *rev'd on other grounds,* 348 U.S. 397 (1955). Another Court of Appeals recognizes that "The board had the same right to evaluate the testimony of a witness before it as has a trial court." *Dickinson* v. *United States,* 203 F.2d 336, 345 (9th Cir.), *rev'd on other grounds,* 346 U.S. 389 (1953).

Several courts have explicitly recognized that "the function of the draft board is quasi-judicial." See *United States* v. *Bouziden,* 108 F. Supp. 395, 399 (W.D. Okla. 1952). The Eighth Circuit has held that draft board members are "quasi-judicial officers rather than in a purely ministerial or executive position." *Gibson* v. *Reynolds,* 172

F.2d 95, 98 (8th Cir. 1949).[19] *Accord, Dodez* v. *Weygandt,* 173 F.2d 965, 966 (6th Cir. 1949); *Nevarez Bengoechea* v. *Micheli,* 295 F. Supp. 257, 258 (D.P.R. 1969) ("Draft board proceedings are quasi-judicial and as such must conform to basic principles of due process of law."); *Benitez-Manrique* v. *Micheli,* 305 F. Supp. 334, 338 (D.P.R. 1969). See also *United States* v. *Stephens,* 245 F. 956, 963 (D. Del. 1917) ("The boards undoubtedly possess discretionary or quasi-judicial powers . . . ."), *aff'd* 247 U.S. 504 (1918).

d. The Moribund Myth of "Little Groups of Neighbors."

In the light of the foregoing demonstration of the powers, functions and processes of local boards, it is sheer fiction to contend that a personal appearance before the board is an informal "non-adversary and non-judicial" encounter between a registrant and his neighbors. See Government's brief, pages 36, 39. If it were ever true that local boards consisted of "little groups of neighbors" getting together informally with a young man from the neighborhood, whom they all had known since infancy, for the purpose of arriving at a mutual consensus on what is best for him and best for the country, it has been conclusively demonstrated that those halcyon days are gone.

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[19] The court analogized draft board members to a variety of other administrative officials, including members of the United States Parole Board, Warden of a Federal Penitentiary, Director of Bureau of Prisons, officials of the Home Owners Loan Corporation, Chairman of the Tariff Commission, and Deputy Fire Marshal. It held local board members and other draft personnel to be quasi-judicial officers because they "must fairly, fearlessly, freely and conscientiously determine the personal destinies of a sector of the American people, probably greater in number than the combined number of all of those affected by the discharge of the official duties of all of the officers first above enumerated." 172 F.2d at 98.

This myth was exploded by the REPORT OF THE NATIONAL ADVISORY COMMISSION ON SELECTIVE SERVICE (the Marshall Commission), IN PURSUIT OF EQUITY: WHO SERVES WHEN NOT ALL SERVE? (1967) (hereinafter "REPORT"), which revealed that the comfortable concept of personalized treatment by boards of neighbors has withered in our increasingly technological and urbanized society:

> "However universally valid this personalized concept might have been in the past, only in rural areas does it appear to be true today. Urban board members usually work in anonymity—and indeed seem to look upon that anonymity as an advantage. Rarely it would seem do those on such a board actually know the men whom they are classifying on the basis of their records—and vice versa. After taking an extensive look into local board operations in one state, a team of researchers reported to the Commission: 'Very little evidence exists to suggest that the fact of drafting by local boards has more than symbolic significance, if that, in urban settings.'" REPORT, p. 20.

The abandonment of the "little groups of neighbors" concept was repeatedly pointed out in *The Selective Service System: Its Operation, Practices, and Procedures,* Hearings before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 91st Cong., 1st Sess., October 29-November 13, 1969 (hereinafter "1969 Senate Hearings"). Included in the Record of those hearings was a study performed by Gary L. Wamsley entitled SELECTIVE SERVICE AND A CHANGING AMERICA (1969). In his study, Mr. Wamsley described how the "local" board concept had rapidly eroded in urban areas:

"In the six months encompassed by this study there was no instance observed in which board members knew a registrant or his family." (1969 Senate Hearings, p. 780).

A study by two staff members of the Marshall Commission, JAMES W. DAVIS, JR., AND KENNETH M. DOLBEARE, LITTLE GROUPS OF NEIGHBORS: THE SELECTIVE SERVICE SYSTEM (1969) (also printed in the Record of the 1969 Senate Hearings), cites many of the factors which depersonalize these so-called "local" boards. Aside from the wide gap between members and registrants in age, occupation and attitude, Davis and Dolbeare identified the residence of board members as a factor:

"One indicator of the validity of the little groups of neighbors image might be the extent to which local board members reside in the local board area. The study by Wamsley found that fully one-third of local board members did not live in their jurisdictions and only a few lived in a location that could be loosely construed as 'in the area.'" (1969 Senate Hearings, p. 765).

In the urban setting, where racial and ethnic homogeneity is usually a more important definition of "neighborhood" than geographical boundaries, the prevalence of white board members on draft boards in black neighborhoods makes a mockery of the "neighbors" concept. Wamsley illustrated this problem in his report:

"A major departure from the 'friends and neighbors' concept was found in a board covering a Negro neighborhood. There were no Negro members on the board and none of the members lived in the jurisdiction. The

> Chairman who was the only member residing even in the 'vicinity,' lived in perhaps the last 'all-white block' to be found near the neighborhood, and had stated on numerous occasions that he would resign before he would allow a Negro to sit on the board." (1969 Senate Hearings, p. 781).[20]

Registrants claiming prejudice by this procedure of classification by non-neighbors of different racial background have been unable to obtain relief because of the concept that even if improperly constituted such local boards have *de facto* authority.[21]

Because the regulation requiring that members of local boards "if at all practicable" be residents of the area where the board has jurisdiction (32 C.F.R. §1604.52(c)) was widely violated, there are many cases holding that improperly constituted local boards lack jurisdiction to classify registrants. *United States* v. *Cabbage*, —— F.2d ——, 3 S.S.L.R. 3179 (6th Cir. July 31, 1970); *United States* v. *Beltran*, 306 F. Supp. 385 (N.D. Cal. 1969); *United States* v. *Machado*, 306 F. Supp. 995 (N.D. Cal. 1969); *United States* v. *Lemke*, 310 F. Supp. 1298 (N.D. Cal. 1969); *United*

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[20] The Marshall Commission reported that there were no Negro members of local boards in the states of Alabama, Louisiana, or Mississippi, where the Negro percentages of the population were respectively 30.06, 31.9, and 42.0.

[21] *DuVernay* v. *United States*, 394 F.2d 979 (5th Cir. 1968), *aff'd by equally divided court* 394 U.S. 309 (1969); *Clay* v. *United States*, 397 F.2d 901 (5th Cir. 1968), *vacated and remanded on other grounds* 394 U.S. 310 (1969); *Sellers* v. *McNamara*, 398 F.2d 893 (5th Cir. 1968) *cert. denied sub nom. Sellers* v. *Laird*, 395 U.S. 950 (1969) (see dissenting opinion of Mr. Justice Douglas); see also *United States* v. *Brooks*, 415 F.2d 502 (6th Cir. 1969); *United States* v. *Johnson*, 302 F. Supp. 584 (M.D. Pa. 1969); *Gee* v. *Smith*, 306 F. Supp. 891 (N.D. Ga. 1969).

States v. *Clinton,* —— F. Supp. ——, Crim. No. 31857 (E.D. La. April 21, 1970); *United States* v. *Jones,* —— F. Supp. ——, 2 S.S.L.R. 3392 (C.D. Cal. October 14, 1969); *United States* v. *DeMarco,* —— F. Supp. ——, 2 S.S.L.R. 3204 (N.D. Cal. July 30, 1969); *United States* v. *McMillan,* —— F. Supp. ——, 2 S.S.L.R. 43 (C.D. Cal. 1969); *United States* v. *Brock,* —— F. Supp. ——, 3 S.S.L.R. 3125 (N.D. Cal. February 26, 1970).

Other courts, however, have refused to require that the residency requirements in the regulations be enforced. *Czepil* v. *Hershey,* 425 F.2d 251 (7th Cir. 1969) *cert. denied* —— U.S. ——, 39 U.S.L.W. 3149 (October 12, 1970); *Jessen* v. *United States,* 242 F.2d 213 (10th Cir. 1957); *United States* v. *Nussbaum,* 306 F. Supp. 66 (N.D. Cal. 1969); *United States* v. *Fisher,* 307 F. Supp. 7 (D. Conn. 1969).

The answer of the Selective Service System to this raft of litigation has been simply to rescind the residency requirements of §1604.52(c) of the regulations. Executive Order No. 11555, 35 Fed. Reg. 14191 (1970), has deleted the requirement that local board members shall "if at all practicable" be residents of the area where the board has jurisdiction. Where the "little groups of neighbors" concept was previously a rapidly dissolving illusion, it is now officially abolished. The myth should not be allowed to survive.

e. Growing Recognition by This Court of Adjudicative Powers of Local Boards.

The history of selective service decisions by this Court, from the World War II era to the present, demonstrates an increasing recognition of the sweeping adjudicative powers of local boards and the adversary nature of a personal appearance. In *Estep* v. *United States,* 327 U.S. 114 (1946),

this Court insisted that selective service orders must be subject to some measure of judicial review in order to protect registrants against an "order which may be constitutionally invalid, or unauthorized by statute or regulation, or issued by mistake, or issued solely as the result of bias and prejudice." 327 U.S. at 126 (concurring opinion, Murphy, J.). In *United States* v. *Nugent,* 346 U.S. 1 (1953), it was ruled that a conscientious objector applicant was entitled to "a fair resume of any *adverse* evidence," *id.* at 6 (emphasis added), because conscientious objector claims involve "difficult analyses of facts and individualized judgments, and there is always a possibility that such a claim has been misjudged by the local board." *Id.* at 8. In *Dickinson* v. *United States,* 346 U.S. 389 (1953), the court noted the great leeway given local boards in hearing and considering different categories of evidence and invalidated local board action that was based on suspicion and speculation.

Two years later, on March 14, 1955, this Court decided four cases dealing with the selective service laws and their administration.[22] In *Witmer* v. *United States,* 348 U.S. 375, 381-382 (1955), the Court outlined the different types of "objective facts" and other evidence relevant to a determination of a conscientious objector applicant's "veracity." *Sicurella* v. *United States,* 348 U.S. 385 (1955), demonstrated that local boards can commit errors of law in interpreting the proper legal criteria for determining

[22] Chief Judge Hutcheson hailed "the four cases just decided . . . [as] a new Magna Charta of liberties in conscientious objector cases, a turning back from conviction by administrative absolutism to conviction only in accordance with the tradition of due process and the law of the land. . . ." *Olvera* v. *United States,* 223 F.2d 880, 882 (5th Cir. 1955).

conscientious objector classification. *Simmons* v. *United States,* 348 U.S. 397 (1955), and *Gonzales* v. *United States,* 348 U.S. 407 (1955), concerned the statutory right then in existence[23] of a conscientious objector applicant to a Department of Justice hearing. The court held it must be a "meaningful hearing," *Gonzales,* 348 U.S. at 415, where the registrant would be entitled to receive in advance a fair resume of the unfavorable evidence in order to enable him to "defend against the adverse evidence—to explain it, rebut it, or otherwise detract from its damaging force." *Simmons,* 348 U.S. at 405. Moreover, the registrant was entitled to a copy of the Department of Justice recommendation to the appeal board so that he could "muster his facts and arguments to meet . . . [the Government's] contentions." *Gonzales,* 348 U.S. at 414. A fair hearing, this court held, was "a fundamental safeguard" to which the registrant is entitled. *Simmons* v. *United States,* 348 U.S. at 406.[24]

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[23] Section 6(j) of the Universal Military Training and Service Act of 1951 provided for referral to the Department of Justice of all claims for conscientious objector classification which were denied by local boards and appealed. The Department was directed to conduct an "appropriate inquiry" and then "hold a hearing with respect to the character and good faith of the objections of the person concerned . . ." 65 Stat. 83. The Military Selective Service Act of 1967 completely eliminated this procedure.

[24] It is significant to note that all four of these 1955 decisions, as well as the 1953 *Nugent* decision, involved Department of Justice hearings under the pre-1967 statute. The right to appear with counsel at such hearings was acknowledged from the beginning. See *United States* v. *Nugent,* 346 U.S. at 4, footnote 3, and Record in *Nugent* case, page 54. See also, Smith and Bell, *The Conscientious Objector Program—A Search for Sincerity,* 19 U. PITT. L. REV. 695, 702 (1958). Thus, all of the discussion and ruling in conscientious objector cases prior to June 30, 1967, occurs in a context where the right to counsel is recognized at a hearing which is a significant part of the process. See discussion, *infra,* p. 73.

The next selective service decision by this Court was the second *Gonzales* v. *United States,* 364 U.S. 59 (1960). The court held, 5-4, that a conscientious objector applicant was not ordinarily[25] entitled to a copy of the hearing officer's report to the Department of Justice. The majority decision was essentially a close analysis of the factual questions before the board and an evaluation of whether there was a basis in fact for the board to have regarded some of the registrant's statements as inappropriately exaggerated.

In *Seeger* v. *United States,* 380 U.S. 163 (1965), this Court construed the statute to apply new criteria for qualification as a conscientious objector, thus providing a new legal test for boards to invoke. At the same time this court reiterated the importance of evaluating "the threshold question of sincerity," "a question of fact." 380 U.S. at 185.

Oestereich v. *Selective Service Board,* 393 U.S. 233, 238 (1968), in the course of striking down lawless reclassification action for punitive reasons, recognized that the customary activity of a local board is the "exercis[ing] of discretion . . . in evaluating evidence and in determining whether a claimed exemption is deserved." The companion *per curiam* decision of *Clark* v. *Gabriel,* 393 U.S. 256, 258 (1968), emphasized the local board's function, in conscientious objector classifications, of fact determination and exercise of discretion. *McKart* v. *United States,* 395 U.S.

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[25] As the court below observed, A. 35, fn. 2, the majority opinion in the second *Gonzales* case recognized that production of the hearing officer's report might be required under other circumstances where its withholding would result in "actual unfairness." 364 U.S. at 64. Applying *Gonzales,* the Second Circuit held that fairness required production in *United States* v. *Purvis,* 403 F.2d 555, 562 (1968).

185 (1969), listed a number of selective service classification questions which involved local boards in the exercise of discretion, 395 U.S. at 198, and ruled that the board had in this case made an incorrect legal interpretation of the statutory exemption for a sole surviving son.

This past term in *Gutknecht* v. *United States,* 396 U.S. 295 (1970), and in *Breen* v. *Local Board No. 16,* 396 U.S. 460 (1970), this Court struck down the delinquency regulations, 32 C.F.R. Part 1642, pointing out, *inter alia,* that their invocation by local boards involved determinations of fact and law totally without due process protections. In *Welsh* v. *United States,* 398 U.S. 333 (1970), the legal criteria by which boards must hear and determine claims of conscientious objection were further refined, and in *Mulloy* v. *United States,* 398 U.S. 410 (1970), this Court referred to the work of the board as being that of "evaluative determination" and pointed out that "Because of the narrowly limited scope of judicial review available to a registrant, the opportunity for full administrative review is indispensable to the fair operation of the Selective Service System." 398 U.S. at 416.

We respectfully submit that this brief review of the sixteen selective service decisions by this Court which have dealt with local board functions over the past twenty-five years reflects an increasingly critical observation of some of the low visibility decision-making processes of selective service local boards, and a corresponding articulation of procedural rights requisite to making an adversary adjudicative hearing into a fair hearing. It is particularly significant, in the light of the repeated admonitions by the Government that allowing the right of counsel would cause untold litigious interruptions and a "constructive paralysis" of the operations of the Selective Service System (Brief,

page 45), that these same arguments were repeated and reiterated in virtually every one of the prior cases, but uniformly rejected by this Court.

f. Judicial Recognition of the Unfairness of Adversary Hearings Without Counsel.

No decision of this Court has discussed the problem arising from the denial of counsel to a registrant at a personal appearance. However, a number of decisions by courts of appeals and district courts have recognized the inherent unfairness to the selective service registrant of the juxtaposition of adversary hearings with the prohibition of counsel. In *United States ex rel. Berman* v. *Craig,* 207 F.2d 888, 891 (3rd Cir. 1953), the court criticized the local board for treating registrants "as though they were engaged in formal litigation assisted by counsel." (Cited with approval by this court in *Simmons* v. *United States, supra.*) The same court, seventeen years later, criticized a local board for exhibiting "an adversary policy towards the defendant, as if he were an antagonist against whom the board was on guard rather than a young man dealing with his own government without the aid of counsel. . . ." *United States* v. *Turner,* 421 F.2d 1251, 1254 (3rd Cir. 1970). *Accord: United States* v. *Greene,* 220 F.2d 792, 794 (7th Cir. 1955); *United States* v. *Stafford,* 389 F.2d 215 (2d Cir. 1968).

Judge MacMahon, of the Southern District of New York, in two widely reported cases, has excoriated the denial of counsel and the Selective Service System view that the informal nature of the proceedings makes counsel unnecessary. *United States ex rel. Vaccarino* v. *Officer of the Day,* 305 F. Supp. 732, 736 (S.D.N.Y. 1969) (a "labyrinth of statutes and regulations, which are inscrutable not only

to laymen but also to most lawyers . . .")[26] In *Walsh* v. *Local Board No. 10,* 305 F. Supp. 1274, 1279 (S.D.N.Y. 1969), Judge MacMahon berated "the draft board's overzealous, high-handed and erroneous handling of this young man's plight. . . ."[27]

The frustrating dilemma facing district court judges reviewing local board files, and noting the harmful effect upon a registrant's rights of the prohibition of counsel when accompanied by limited judicial review, was aptly noted by Judge Doyle in *United States* v. *Wierzchucki,* 248 F. Supp. 788, 790 (W.D. Wisc. 1965):

> "It appears that the time may have come for re-evaluation of the constitutional implications of the closed circuit outlined above . . . .
>
> "This court considers that this motion to dismiss presents a true dilemma, that the issue it raises is

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[26] Judge MacMahon observed that it would take "a skilled lawyer" to "glean from the murky language" that a certain notice had informed petitioner of his rights to a personal appearance and an appeal. 305 F. Supp. at 735. Cf. *United States* v. *Harris,* 302 F. Supp. 1194, 1196 (D. Oreg. 1968).

[27] Judge MacMahon observed further:

> "[I]t is this kind of mistreatment which has alienated the youth of the nation, bred disrespect for law, sparked the disorders which have torn a gap between generations and ripped open the very structure of society. It feeds the clamor for abolition of the whole selective service system, from top to bottom, not only by mounting numbers of defiant young men, but also by the President and many members of congress, where no less than 43 bills to change the draft law are pending. At the very least, those entrusted with the awful power of conscripting the nation's young men into the armed forces in time of war or other military venture owe a duty of the most searching examination of the facts, scrupulous fairness, sensitive care, compassionate hearing, patient consideration, cautious action and deliberate and rational decision within the law. We afford no less to the worst criminal in our society." *Id.*

genuine and profound, and that the resolution of the underlying issue cannot and should not be avoided."[28]

2. *Since a Personal Appearance Is an Adjudicative Hearing Affecting Substantial Rights, the Prohibition of Counsel Is in Violation of the Constitutional Right, Arising From the Fifth Amendment, to Minimum Standards of Due Process at Such a Hearing.*

a. An Adjudicative Hearing Is Not Lawful Unless at Least the Constitutionally Minimum Standards of Due Process Are Afforded.

(1) We have demonstrated above that a personal appearance is substantially similar in all vital respects to any other adjudicative hearing by an administrative agency. This Court, on numerous occasions, has declared that certain minimum due process rights are constitutionally guaranteed to "those who are brought into contest with the Government in a quasi-judicial proceeding aimed at the control of their activities." *Morgan* v. *United States,* 304 U.S. 1, 18 (1938). Chief Justice Warren, writing for the court in *Hannah* v. *Larche,* 363 U.S. 420, 442 (1960), held:

> ". . . when governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process."

"This Court has been zealous to protect these rights from erosion . . . not only in criminal cases . . . but also in all

[28] Cited with approval in *United States* v. *Freeman,* 388 F.2d 246 (7th Cir. 1967). See also *United States* v. *Schwartz,* 143 F. Supp. 639, 640 (E.D.N.Y. 1956) (failure to provide legal advisors "for counsel as to his rights," as required by regulation then in effect, deprives registrant of valuable rights and requires finding of not guilty).

types of cases where administrative and regulatory actions were under scrutiny." *Greene* v. *McElroy,* 360 U.S. 474, 497 (1959). It was pointed out in *Hannah* v. *Larche, supra,* that the well-known distinction in administrative law between administrative agencies acting in a rule-making or investigative capacity, and agencies performing an adjudicatory function, had specific due process consequences. Consequently, the Court ruled that certain due process rights were not available in the investigatory and fact-finding proceedings of the Civil Rights Commission, since such rights were not customarily available "when Governmental action does not partake of an adjudication." 363 U.S. at 442.[29] The court elaborately discussed the differences between the two kinds of proceedings and explained that the traditional safeguards of due process which were held requisite in *Morgan* v. *United States, supra; Greene* v. *McElroy, supra;* and *Joint Anti-Facist Refugee Committee* v. *McGrath,* 341 U.S. 123 (1951), were all because "the government agency involved in each was found by the Court to have made determinations in the nature of adjudications affecting legal rights." *Hannah* v. *Larche,* 363 U.S. at 451.

It could hardly be contested that a selective service registrant at a personal appearance before his local board is involved in a "proceeding aimed at the control of [his] activities." *Morgan* v. *United States, supra.* It is, likewise, indisputable that a local board at a personal appearance makes "binding determinations which directly affect the legal rights of individuals." *Hannah* v. *Larche, supra.*

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[29] A limited right of counsel, including the right to appearance in person with the person called before the Commission, and to render advice concerning constitutional rights, was nevertheless recognized by the Commission. *Id.* at 431.

(2) That an administrative agency, for all its uncircumscribed rule-making or investigatory power, cannot adjudicate personal or property rights without providing the essentials of a fair hearing is virtually a first principle of administrative law. This principle has been applied in a large variety of administrative proceedings by this Court and by lower federal courts. See, e.g., *Goldberg* v. *Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits); *Londoner* v. *City of Denver*, 210 U.S. 373 (1908) (tax assessment);[30] *Goldsmith* v. *United States Board of Tax Appeals*, 270 U.S. 117 (1926) (license rights);[31] *United States* v. *Abilene & So. Ry.*, 265 U.S. 274 (1924)[32] (public utility rates);[33] *Gonzalez* v. *Freeman*, 334 F.2d 570 (D.C. Cir. 1964) (debarment of Commodity Credit contractor);[34] *Kwong Hai Chew* v. *Colding*, 344 U.S. 590

[30] See also *Lipke* v. *Lederer*, 259 U.S. 557 (1922); *Central of Georgia Ry.* v. *Wright*, 207 U.S. 127 (1907); cf. *Anniston Mfg. Co.* v. *Davis*, 301 U.S. 337 (1937); *McGregor* v. *Hogan*, 263 U.S. 234 (1923).

[31] See also *Willner* v. *Committee on Character and Fitness*, 373 U.S. 96 (1963); *Bratton* v. *Chandler*, 260 U.S. 110 (1922); *Hornsby* v. *Allen*, 326 F.2d 605 (5th Cir. 1964).

[32] "Nor was the proceeding under review any the less an adversary one because the primary purpose of the Commission was to protect the public interest. . . ." 265 U.S. at 289, per Cardozo, J.

[33] See also *Railroad Commission of California* v. *Pacific Gas & Electric Company*, 302 U.S. 388 (1938); *Morgan* v. *United States*, *supra*; *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U.S. 292 (1937); *West Ohio Gas Co.* v. *Public Utilities Commission of Ohio* (No. 1), 294 U.S. 63 (1935).

[34] Then Circuit Judge Burger pointed out that "debarment is not intended to punish but is a necessary 'means for accomplishing the congressional purpose' of Commodity Credit to 'aid in the development of foreign markets for, agricultural commodities.'" *Id.* at 577. This is a succinct refutation of the baseless contention made in the Government's brief (p. 39) that due process rights need not be afforded selective service registrants because the purpose of the personal appearance and classification is not "punitive."

(1953)[35] (deportation of alien);[36] *Escalera* v. *New York City Housing Authority,* 425 F.2d 853 (2d Cir.), *cert. denied* —— U.S. ——, 39 USLW 3149 (1970) (termination of public housing tenancy and imposition of additional rent charges); *Parker* v. *Lester,* 227 F.2d 708, 716 (9th Cir. 1955) (termination of merchant seaman's employment: "When it is proposed to take from a citizen through administrative proceedings some right which he otherwise would have, it has always been held that the constitutional requirement is that he shall be afforded notice and an opportunity to be heard.").[37]

In the light of the foregoing, the suggestion in the Government's brief (p. 36, n. 25) that due process might be satisfied without an opportunity to appear in person appears almost incredible. This Court, in *Goldberg* v. *Kelly, supra,* expressly held that the due process clause of the Fifth Amendment guaranteed certain procedural rights, the most fundamental of which was the right to be heard and to be heard in a meaningful manner. 397 U.S. at 267-268.[38]

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[35] ". . . not even Congress may expel him without allowing him a fair opportunity to be heard." 344 U.S. at 598.

[36] See also *Wong Yong Sung* v. *McGrath,* 339 U.S. 33, 50 (1950) ("When the Constitution requires a hearing, it requires a fair one, one before a tribunal which meets at least currently prevailing standards of impartiality.")

[37] See also *Greene* v. *McElroy, supra.*

[38] The case cited in the Government's brief (at n. 25), *Federal Communications Commission* v. *WJR,* 337 U.S. 265, 275-77 (1949), presumably in support of its suggestion that a personal appearance could be dispensed with entirely, is specifically distinguished by this court in *Goldberg* v. *Kelly, supra,* n. 15, as one not involving fact-finding or fact determination.

b. The Constitutionally Minimum Standards of Due Process Require Recognition of the Right to Appear With Counsel.

(1) The indisputable place of counsel in the administrative adjudicatory process is so widely acknowledged and recognized that it is unusual to find a modern case[39] where a court is called upon to rule on this question. Most cases involving due process rights before administrative agencies involve a factual setting where some right to counsel was acknowledged or assumed, and the questions to be decided were what additional due process rights were required.[40] In *Goldberg* v. *Kelly, supra,* this Court held, without any elaboration, as if to signify that it was virtually self-evident, that any enunciation of the due process rights of welfare recipients would be meaningless unless the right to counsel were included. 397 U.S. at 270.[41]

Decisions of this court dealing with the due process rights of juveniles have made it very clear that even in these noncriminal proceedings the right to counsel was absolutely necessary to insure fair treatment. See *In re Gault,* 387 U.S. 1 (1966); *Kent* v. *United States,* 383 U.S.

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[39] As long ago as 1877, it was stated that ". . . however much the forms of proceeding or the nature of the tribunal may be changed, due process of law must necessarily include each and all of these requisites" [including "right to counsel"]. STORY ON THE CONSTITUTION (Cooley Ed.), at 668.

[40] See, e.g., *Greene* v. *McElroy, supra; Hannah* v. *Larche, supra; Morgan* v. *United States,* 304 U.S. at 16; *United States* v. *Nugent,* 346 U.S. at 4, n. 3 (1953).

[41] The Government's brief, after unconvincingly attempting to distinguish *Goldberg* v. *Kelly* (p. 48), then proceeds to criticize the decision, particularly the court's citation of *Powell* v. *Alabama,* 287 U.S. 45 (1932), p. 48, n. 39.

541 (1966). This Court held in *Gault* that "the juvenile needs the assistance of counsel to cope with problems of law, to make skilled inquiry into the facts, to insist upon regularity of the proceedings . . . ." 387 U.S. at 36. It is respectfully submitted that the selective service registrant, whether an 18- to 20-year-old "juvenile" or a 21- to 26-year-old "adult," likewise needs the assistance of counsel for these very same purposes. In *Kent* v. *United States, supra,* a decision rendered by this Court prior to the declaration of full due process standards in *Gault,* the Court observed that it might even be sufficient for a hearing in a juvenile case to provide a lesser degree of due process than "the usual administrative hearing;" but the court made it clear that even under this lesser standard the right of counsel was so primary that it must be recognized. 383 U.S. at 561.[42]

Other federal agencies where the question of the right to be represented by counsel has been raised have, with the sole exception thus far of the Selective Service System, been uniformly admonished by the courts to allow the presence of counsel. See *Bowles* v. *Baer,* 142 F.2d 787, 789 (7th Cir. 1944) (Circuit Judge, later Mr. Justice, Minton held it essential as part of any hearing that "The parties are entitled to be present in person and by counsel . . . ."). *Accord*: *Hyun* v. *Landon,* 219 F.2d 404, 406 (9th Cir. 1955), *aff'd* 350 U.S. 990 (1956) (deportation proceeding; " . . . indispensable to a fair hearing are reasonable notice, the

[42] The primacy of the right to counsel was emphasized by Mr. Chief Justice Schaefer of the Illinois Supreme Court, in *Federalism and State Criminal Procedure,* 70 HARV. L. REV. 1, 8 (1956): "Of all the rights that an accused person has, the right to be represented by counsel is the most pervasive, for it affects his ability to assert any other rights he may have."

right to examine witnesses and to testify and to present witnesses and to be represented by counsel . . . .").[43]

In a series of cases involving the rights of parolees at parole revocation hearings, the Court of Appeals for the District of Columbia has held that the statutory right of a parolee to appear before the parole board for such purpose would be totally ineffective and meaningless without the right to counsel. *Fleming* v. *Tate,* 156 F.2d 848 (D.C. Cir. 1946); *Moore* v. *Reid,* 246 F.2d 654 (D.C. Cir. 1957); *Hyser* v. *Reed,* 318 F.2d 225 (D.C. Cir. 1963). In *Fleming* v. *Tate, supra,* the court reversed an administrative practice of denying parolees the right to counsel which had been in existence since 1910. "The long administrative practice would be compelling upon us if we did not consider the statute plain and the issue vitally important." 156 F.2d at 851. *Fleming* v. *Tate* is often described as being based simply on the words of the statute and without any constitutional gloss. See *Hyser* v. *Reed, supra.* However, the court in *Fleming* v. *Tate* gave explicit constitutional content to its holding: "These two features, the presence of counsel and the receipt of evidence, are the basic characteristics of our whole system of administration of justice." *Id.* at 850.[44]

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[43] See also *Yiannopoulos* v. *Robinson,* 247 F.2d 655, 657 (7th Cir. 1957); cf. *United States ex rel. Castro-Louzan* v. *Zimmerman,* 94 F. Supp. 22, 26 (E.D. Pa. 1950); *Ex parte Chin Loy You,* 223 F. 833, 838-839 (D. Mass. 1915) (although no absolute right to counsel in deportation proceedings, where counsel "seasonably requests the privilege of being present . . . during the taking of the evidence," refusal of the request denied a fair hearing.)

[44] In *Menechino* v. *Oswald,* —— F.2d ——, No. 34665 (2d Cir., August 5, 1970), a majority of the Second Circuit held that the acknowledged right of counsel in New York State parole revocation proceedings could not be extended to allow counsel at parole application hearings. Circuit Judge Feinberg dissented, holding that there was such a right under *Goldberg* v. *Kelly, supra,* and *Mempa*

In accord are a number of decisions of state courts, including the Supreme Court of Illinois, which held:

> "Even if the statute did not provide a right to counsel in a proceeding such as here, which could affect one's property rights, the right to counsel would be undeniable. Administrative as well as judicial proceedings are governed by fundamental principles and requirements of due process of law."

Brown v. *Air Pollution Control Board,* 11 Ill.2d 450, 454, 227 N.E.2d 754, 756 (1967); cited with approval in *Kammerer* v. *Board of Fire and Police Commissioners,* 44 Ill.2d 500, 256 N.E.2d 12, 14 (1970, per Mr. Justice Schaefer). See also *In re Henderson Harris,* 69 Cal.2d ——, 446 P.2d 148 (1968) (civil commitment proceedings); *Bancroft* v. *Board of Governors,* 202 Okla. 108, 210 P.2d 666 (1949) (In hearing where Board has power to revoke dentist's license, dentist may be represented by counsel.); *Berkshire Fine Spinning Associates* v. *Label,* 74 R.I. 6, 60 A.2d 871 (1948) (In proceeding under State Workmen's Compensation Law, employee could have counsel if requested.); *Wisconsin Telephone Co.* v. *Public Service Commission,* 232 Wisc. 274, 287 N.W. 122 (1939) (A legislative act conferring power upon Public Service Commission to issue order affecting rights of citizens without opportunity to be heard is invalid and the right to hearing includes counsel.);

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v. *Rhay,* 389 U.S. 128 (1967). However, the entire court agreed that the right to counsel was an essential ingredient of procedural due process under the following circumstances:

> "The type of interest protected by procedural due process . . . is usually one presently enjoyed, e.g., welfare benefits . . . occupation of premises . . . attendance at school . . . status as an alien immigrant . . . employment . . . or existence as a charitable organization. . . ." Slipsheet Opinion at 4089 (citations omitted).

People ex rel. the Mayor v. *Nichols,* 79 N.Y. 582, 588 (1880) ("[I]n no other way could the person sought to be removed [from office] have a due hearing or 'opportunity to be heard'."); *People ex rel. Ellett* v. *Flood,* 64 App. Div. 209, 71 N.Y. Supp. 1067 (3rd Dept. 1901); *Almon* v. *Morgan County,* 245 Ala. 241, 16 So.2d 511 (1944) (Procedural due process, whether in administrative authority or court, includes right to counsel if desired.); *Bd. of Education* v. *Kennedy,* 256 Ala. 478, 55 So.2d 511 (1951) (In hearing before Board of Education for dismissal of teacher, due process includes right to counsel.).

Until June 30, 1967, there was an acknowledged right to counsel for conscientious objector applicants appearing in person before the Department of Justice hearing officer. See *United States* v. *Nugent, supra,* 346 U.S. at 4, n. 3; *Storey* v. *United States,* 370 F.2d 255 (9th Cir. 1966); Smith & Bell, *The Conscientious Objector Program—A Search For Sincerity,* 19 U. PITT. L. REV. 695, 702 (1958); cf. *Petersen* v. *Clark,* 289 F. Supp. 949, 952 (N.D. Cal. 1968) (counsel allowed to appear at local board). The right to be accompanied and advised by counsel at hearings occurring at this vital stage[45] of adjudication of conscientious objector claims may well have ameliorated to some extent the prohibition against counsel at the local board personal appearance. Since mid-1967, however, a selective service registrant has been totally stripped of any right to be accom-

[45] "Observers sympathetic to the problems of the conscientious objector have recognized that this provision in the statute improves the system of review . . . ." *United States* v. *Nugent, supra,* 346 U.S. at 9. "As a result, a more objective and disinterested approach to granting exemptions can be expected." *United States* v. *Gearey,* 368 F.2d 144, 148 (2d Cir. 1966). See Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace,* 54 U. VA. L. REV. 1355, 1380, n. 98 (1968).

panied and advised by counsel when he is face-to-face with those who must decide his fate.

(2) Without any real specification or explanation, the Government argues at various places in its brief (p. 38, p. 40, p. 47) that the right to counsel should not be recognized for selective service registrants because of some notion of selective service exceptionalism. Without identifying the nature and dimension of the exception, much less justifying it, the Government argues that regardless of the due process standards which may be applicable to other agencies, selective service is somehow different.

We respectfully submit that the Government is defending a totally baseless myth which was created by the Selective Service System for its own bureaucratic convenience. As we have shown above, in all material respects selective service local boards make decisions affecting personal and property rights no differently from any other administrative agency. Yet, because of the sedulous propagation of selective service mythology, the Selective Service System alone, of dozens, even hundreds, of federal administrative agencies, appears to be the only administrative agency whose regulations presume explicitly to prohibit the appearance of counsel. We list in the footnote[46] thirty-four federal

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[46] The right to be represented by counsel is guaranteed by statute in proceedings before the Civil Aeronautics Board, 49 U.S.C.A. 1481; Civil Rights Commission, 42 U.S.C.A. 1975a; Indian Claims Commission, 25 U.S.C.A. 70n; Interstate Commerce Commission, 49 U.S.C.A. 17(12); Longshoremen's and Harbor Workers Compensation Board, 33 U.S.C.A. 919; National Railroad Adjustment Board, 45 U.S.C.A. 153 j; Veterans Administration, 38 U.S.C.A. 3404.

Regulations acknowledge the right to counsel in the Atomic Energy Commission, 10 C.F.R. 2.713; Board of Immigration Appeals, 8 C.F.R. 3.1; Building and Defense Services Administration, BDSA Reg. 5, Sec. 8; Civil Service Commission, 5 C.F.R. 22.601;

administrative agencies where the right to counsel is guaranteed by statute and/or regulations. Moreover, appellee's counsel respectfully advise the court that an exhaustive study has been made of the various federal agencies and there does not appear to be a single instance, other than selective service, where the right to counsel is expressly prohibited. "This near-uniform judgment of the Nation," see *Baldwin* v. *New York*, 399 U.S. 66, 72 (1970), should, in logic, place some reasonable obligation upon those who would justify this unitary exception to come forward and provide cogent reasons for its existence.[47] But, as we

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Civil Service Commission (Voting Rights Program), 45 C.F.R. 801.308; Commodity Exchange Commission, 17 C.F.R. 0.61; Delaware River Basin Commission, 18 C.F.R. 401.42; Employees Compensation Appeals Board, 20 C.F.R. 501.11; Federal Aviation Administration, 14 C.F.R. 13.33; Federal Communications Commission, 47 C.F.R. 1.22; Federal Deposit Insurance Corporation, 12 C.F.R. 308.2; Federal Housing Administration, 24 C.F.R. 200.192; Federal Maritime Commission, 46 C.F.R. 136.07-35; Federal Power Commission, 18 C.F.R. 1.4; Federal Reserve Board, 12 C.F.R. 263.3; Federal Tariff Commission, 19 C.F.R. 201.15; Federal Trade Commission, 16 C.F.R. 4.23; Federal Water Pollution Control Administration, 18 C.F.R. 606.8(d); Food and Drug Administration, 21 C.F.R. 2.58; Foreign Claims Settlement Commission, 45 C.F.R. 500.1; National Labor Relations Board, 29 C.F.R. 102.38; Packers and Stockyards Act—Hearings Under Department of Agriculture, 9 C.F.R. 202.11c; Patent Office, 37 C.F.R. 1.31; Securities Exchange Commission, SEC Rules of Procedure #2; Small Business Administration, 13 C.F.R. 103.13; Subversive Activities Control Board, 28 C.F.R. 201.5; Tennessee Valley Authority, 18 C.F.R. 301.2(f) 2.

[47] Cf. Mr. Justice Frankfurter's concurring opinion in *Joint Anti-Fascist Refugee Committee* v. *McGrath*, 341 U.S. 123, 149, 172 (1951):

> "That a hearing has been thought indispensable in so many other situations, leaving the cases of denial exceptional, does not of itself prove that it must be found essential here. But it does place upon the Attorney General the burden of showing weighty reason for departing in this instance from a rule so deeply imbedded in history and in the demands of justice."

believe we have demonstrated, there does not exist any basis for this exception in law or in fact.

Nevertheless, given the existence of some twenty years of selective service mythology, it is not surprising that a body of case law has developed which is said to be supportive of the selective service exception. See Government's brief, pages 36-38. It is surprising, however, how little real discussion and analysis there is in any of these cases and how readily distinguishable they are for a number of reasons.

(3) The cases cited by the Government appear to be an impressive array in support of the proposition that the Constitution does not compel that a registrant be permitted an attorney in Selective Service proceedings. Upon closer examination, however, this array becomes much less impressive; indeed, none of the cases cited by the Government, and none which counsel for appellee have been able to discover, can be said to have devoted to this issue any semblance of the serious consideration which it requires.

Both *United States* v. *Schwartz*, 143 F. Supp. 639 (E.D. N.Y. 1956), and *United States* v. *Wierzchucki*, 248 F. Supp. 788 (W.D. Wisc. 1965), alleged by the Government to contain dicta in support of its contentions, should properly be read in precisely the opposite light. *Schwartz* dealt with a defendant who asserted that he had been prejudiced because his local board had failed to post the names of advisors to registrants, at a time when Section 1604.41 of the Regulations (32 C.F.R. 1604.41) made the appointment of advisors and the posting of their names mandatory. The court held that, *because* of the denial of counsel before the local board, the registrant "must depend on the advisors for counsel

as to his rights to a proper classification," 143 F. Supp. at 640, and that failure to comply with the regulation was thus so prejudicial as to require a finding of not guilty. No opinion expressing such scrupulous concern that the registrant have proper advice as to his rights can be taken to support the contention that the registrant may be denied counsel even where the appointment of advisors has become discretionary.

Likewise, *United States* v. *Wierzchucki,* discussed *supra* at p. 55, can hardly be said to support the Government's position; the court merely notes the fact of denial of counsel, and suggests great dissatisfaction with it. Finding the record insufficiently developed, however, the court asserts that it is unable to reach a decision on the point, and does not do so.

A substantial number of the cases which the Government cites devote not more than a sentence or two to the counsel issue, often a mere conclusory statement. Perhaps most extreme is *United States* v. *Tantash,* 409 F.2d 227, 228 (9th Cir. 1967), in which the entire discussion of the point is as follows: "Appellant was not entitled to be provided with legal assistance in the selective service process. 32 C.F.R. 1624.1(b)." Other cases disposing of the counsel question in a similarly cavalier manner, occasionally offering one or two supporting precedents, but giving the issue no discussion whatever, include *Cassidy* v. *United States,* 428 F.2d 585 (8th Cir. 1970); *United States* v. *Evans,* 425 F.2d 302 (9th Cir. 1970); *United States* v. *Willis,* 409 F.2d 830 (5th Cir.), *cert. denied* 396 U.S. 864 (1969); *Chaney* v. *United States,* 406 F.2d 809 (5th Cir.), *cert. denied* 396 U.S. 867 (1969); *Madera* v. *Board of Education,* 386 F.2d 778 (2d Cir. 1967), *cert. denied* 390 U.S. 1028 (1968), which was not

a selective service case;[48] *United States* v. *Mendoza,* 295 F. Supp. 673 (E.D.N.Y. 1969); *United States* v. *Heljenek,* 275 F. Supp. 579 (E.D. Pa. 1967); *United States* v. *Kovalchick,* 255 F. Supp. 826 (E.D. Pa. 1966).

Others of these cases appear to deal only with the right to counsel in the selective service appellate process, such as both the *Capson* cases, *United States* v. *Capson,* 347 F.2d 959 (10th Cir.), *cert. denied* 382 U.S. 911 (1965), and *Capson* v. *United States,* 376 F.2d 814 (10th Cir.), *cert. denied* 389 U.S. 901 (1967); and *Imboden* v. *United States,* 194 F.2d 508 (6th Cir.), *cert. denied* 343 U.S. 957 (1952).

Moreover, the *Capson* cases both dealt only with the question of whether the right to counsel in criminal cases guaranteed by the Sixth Amendment extended to selective service proceedings; this is made clear at the very outset of the earlier of the two, *United States* v. *Capson, supra,* in the court's statement that Capson's claim was "That he was denied the assistance of counsel, as guaranteed by the VI Amendment . . . " 347 F.2d at 960. Other cases considering only the Sixth Amendment contention include *Camp* v. *United States,* 413 F.2d 419 (5th Cir.), *cert. denied* 396 U.S. 968 (1969); *McCoy* v. *United States,* 403 F.2d 896 (5th Cir. 1968); *Haven* v. *United States,* 403 F.2d 384 (9th Cir. 1968), *cert. dismissed* 393 U.S. 1114 (1969); *Merritt* v. *United States,* 401 F.2d 768 (5th Cir. 1968); *Nickerson* v. *United States,* 391 F.2d 760 (10th Cir.), *cert. denied* 392 U.S. 907 (1968).

In none of these cases is serious attention given even to the Sixth Amendment contention. See *infra,* pp. 81-88. Typical of the opinions is that in *Merritt,* asserting that

[48] "Furthermore," as the court below correctly noted, "to the extent that the *Madera* case relies on Selective Service cases for authority it is for present purposes circular." A. 39.

"The procedure under the draft law and classification by a local board is in no way penal, nor is it a criminal trial with the right to be represented by counsel, and to call, examine, and cross-examine witnesses." 401 F.2d at 769. There is no discussion of the many quasi-judicial and adjudicatory functions which are in fact performed by the local board, as discussed *supra* pp. 43-45; the language is directly traceable to dictum in *Ex parte Stanziale,* 138 F.2d 312, 314 (3rd Cir.), *cert. denied sub nom. Stanziale* v. *Paullin,* 320 U.S. 797 (1943), a wartime case which expressed no opinion as to the constitutionality of the denial of counsel, but merely was acknowledging the existence of the regulations and the state of war.[49]

In some of the cases, it was held that denial of counsel could not be alleged as a ground of prejudice, because no request for counsel had been made at the time of appearance; this is so in *United States* v. *Richmond,* 274 F. Supp. 43 (C.D. Cal. 1967); elsewhere, not only had counsel not been requested, but the registrant did not allege that lack of counsel had prejudiced him. In many of the latter cases, as in *Stanziale, supra,* the courts cannot be said to have expressed any opinion on the constitutionality of the denial of counsel; they merely recited the existence of the prohibition in outlining the situation faced by the registrant. Representative of the utterly gratuitous remarks on counsel

[49] It should further be remembered that this 1943 case, which the Government cites repeatedly (Brief pp. 38-39) as its standard-bearer, was decided at a time when there was virtually no judicial review of selective service cases; *Estep* v. *United States,* 327 U.S. 114, was not decided until three years later. The completely different jurisprudential world prevailing at the time of the *Stanziale* decision is vividly demonstrated by the court's remarks that the Government had won all but three cases since the adoption of the Act in 1940—and that the Government had enjoyed the same statistical experience with the World War I draft act. 138 F.2d at 314, n. 5.

occasionally to be found in this area is that in *United States* v. *Pitt,* 144 F.2d 169, 172 (3rd Cir. 1944):

> "While a denial of the right to counsel in a judicial proceeding would constitute a denial of due process, the proceedings before the selective service agencies are not within that category. It will be observed moreover that . . . he at no time requested the Board to permit counsel to appear in his behalf. *He does not assert that his lack of counsel is evidence of denial of due process.*" (Emphasis added.)

Similar to *Pitt* in the immateriality of their remarks on counsel are *Lehr* v. *United States,* 139 F.2d 919 (5th Cir. 1943), and *United States* v. *Miller,* 143 F. Supp. 712 (N.D. W.Va.), *aff'd* 239 F.2d 148 (4th Cir. 1956).

In light of the above discussion, it is apparent that none of the cases so far considered has given any real consideration to the contention that the denial of counsel in selective service proceedings constitutes a deprivation of the due process of law guaranteed by the Fifth Amendment. The five remaining cases of those raised by the Government have indeed taken cognizance of the issue, but none of them in any persuasive way.

Thus, the exceedingly confused opinion in *United States* v. *Dicks,* 392 F.2d 524 (4th Cir. 1968) rejects the due process claim without coming to grips with it at all. Having already discounted defendant's claims that he had been denied due process by various other acts of the board, the court states in its discussion of the counsel question:

> "As already stated, there has been no violation of the registrant's rights under the Fifth Amendment since he was accorded due process of law.
>
> • • • • •

> "The record before this Court leads to the irrefutable conclusion, both in law and in fact, that this defendant was accorded due process." 392 F.2d at 528.

Nowhere does the court appear even to recognize, let alone discuss, the possibility that the denial of counsel, in and of itself, might be a denial of due process.

The opinion in *United States* v. *Mientke,* 387 F.2d 1009 (7th Cir. 1967), *cert. denied* 390 U.S. 1011 (1968), is similar; although defendant raised both Fifth Amendment and Sixth Amendment claims, the court does not appear to deal with the counsel question in a Fifth Amendment context. Rather, it bases its opinion solely on the assertion that "The proceedings before the Local Board are not converted from administrative in nature to criminal by virtue of the defendant's having subsequently been accused of the crime of failing to obey an order to report for civilian duty." 387 F.2d at 1011. There is no consideration of the applicability of due process standards to "administrative" as well as to "criminal" proceedings.

United States v. *Sturgis,* 342 F.2d 328 (3rd Cir.), *cert. denied* 382 U.S. 879 (1965), merely presents a conclusory assertion which does not follow from its premise:

> "[T]he proceedings before the Board are non-judicial in nature and they are clearly non-criminal. The appellant here was neither a suspect nor an accused and he was appearing before Local Board No. 121, which was giving him a hearing only in an administrative proceding. Therefore, to extend the right of counsel to an individual who is concerned in a non-judicial and non-criminal proceeding would be an unwarranted extension of the individual's right to counsel." 342 F.2d at 332.

The only authority offered for the above holding is that, in *United States* v. *Pitt, supra,* according to the court, it had "directly ruled the point that the denial of counsel before the Local Board is not a denial of due process." 342 F.2d at 332. *Pitt,* of course, did not "directly rule" on the point; nor does this court nor any other of the many courts relying directly on the World War II-era decisions make more than the briefest mention of the intervening two decades of developing concepts of due process. See discussion *supra* at pp. 60-67. Also omitted is any consideration of the continuing reduction of the amount and quality of advice afforded to registrants by the Selective Service System itself.[50]

Peterson v. *United States,* 173 F.2d 111 (6th Cir.), *cert. denied* 337 U.S. 925 (1949), devotes a single brief paragraph to the due process issue. Because of its age, it is subject to much the same criticism as is *Pitt, supra,* on which it relies; nor does it support its holding with any more cogent argument than the conclusory statement that "He was not entitled to a judicial trial before the draft boards, but rather to judicial review, in the criminal proceedings, of the board's administrative action, as was given him in this case." 173 F.2d at 115.

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[50] Under the 1940 Act, the regulations provided for three-member advisory boards for all registrants (32 C.F.R. (1940 Supp.) 601.145; 32 C.F.R. (1943 Cum. Supp.) 603.41). From 1948 to 1955, the Regulations made it mandatory that each local board have one or more advisors to registrants, wholly separate from the appeal agents, whose sole duty was to the registrants (32 C.F.R. 1604.41, as promulgated by Exec. Ord. No. 9979 of July 20, 1948, 13 Fed. Reg. 4179; 32 C.F.R. (1951 Rev.) 1604.41). Since 1955, however, the appointment of such advisors has only been optional (32 C.F.R. 1604.41, as amended by Exec. Ord. No. 10594 of Jan. 31, 1955, 20 Fed. Reg. 735). See the discussion of present availability and adequacy of local board advisors, *infra* at pp. 93-97.

Niznik v. *United States,* 173 F.2d 328 (6th Cir.), *cert. denied* 337 U.S. 925 (1949), is subject to precisely the same criticisms as *Peterson, supra;* moreover, the *Niznik* court appears to have proceeded on the assumption that the actions of the board are subject to much broader review than is generally thought to be the case, as it stated that even if a basis in fact could be found for the board's classification, any question of prejudice on the part of the board might properly be put to the jury and be considered as grounds for an acquittal. 173 F.2d at 326. Cf. *Estep* v. *United States,* 327 U.S. 114 (1946); see also the discussion of judicial review, *infra* at pp. 81-83.

It is manifest from the preceding examination of cases which are purported to have held that denial of counsel in the selective service process does not constitute an abridgement of constitutionally guaranteed rights, that the only conclusion which may be drawn is that the issue has never been given the serious and careful consideration warranted by a matter of such major constitutional dimension. No case has given more than the barest minimum of attention to the issues here involved, none has taken more than the most grudging notice of the developing and expanding concepts of due process and right to counsel, and none has offered any persuasive argument to support the denial of such important safeguards.

(4) The Government strains to distinguish, as it necessarily must, two recent non-criminal right of counsel decisions of this Court, *In re Gault,* 387 U.S. 1 (1966), and *Goldberg* v. *Kelly,* 397 U.S. 254 (1970) (Brief, pp. 47-49). It argues that *Gault* is wholly inapplicable because juvenile court proceedings are "adversary and potentially puni-

tive" (p. 48).[51] That proceedings which occur at a local board personal appearance are plainly adversary is conclusively established in a prior section of this brief. See pp. 37-66, *supra*. That local board adjudicative proceedings are "potentially punitive" is evident from that which inevitably occurs when a conscientious objector applicant is rebuffed by the board and has no other effective means of judicial review than a defense to a criminal prosecution for induction refusal. See *infra*, pp. 83-86.

In its attempted distinction of *Goldberg* v. *Kelly*, *supra*, the Government concedes that welfare termination hearings are of necessity adversary, but persists in denying the obviously equally adversary nature of selective service proceedings. The Government extracts from *Goldberg* v. *Kelly* four functions of counsel which, it claims, demonstrate that counsel could not serve a similar valid function in selective service local board proceedings. But the Government's case proves its opposite, since the functions of counsel in a welfare termination hearing, as declared by this Court in *Goldberg* v. *Kelly*, and as conceded by the Solicitor General, apply with equal if not greater force at selective service local board hearings. As we have demonstrated, counsel are indeed needed to "delineate the issues," "present the factual contentions in an orderly manner," and "generally safeguard the interests of the recipient." *Goldberg* v. *Kelly*, 397 U.S. at 270-271; Government's brief

[51] Obviously, the Government cannot argue that juvenile court proceedings are different from selective service local board proceedings because the former are "criminal," since this court has plainly held that juvenile court proceedings of the type involved in the *Gault* case are, indeed, non-criminal but nevertheless entitled by the due process clause to the right of counsel. See *In re Gault*, *supra*, and *Kent* v. *United States*, *supra*.

p. 49.[52] It is abundantly clear that a selective service registrant, no less than the welfare recipient, is in need of professional legal assistance to delineate the issues, present the factual contentions in support of his claim in an orderly and persuasive manner, and generally safeguard his interests. We submit that the Government could hardly contest this rather self-evident proposition for any adversary proceeding. However, it persists in the propagation of the selective service myth that there is nothing adversary involved in a selective service local board personal appearance.

Not unexpectedly, the Government resorts to the familiar "parade of horribles" argument by a series of presumably horrifying rhetorical questions (Brief, p. 46), which seek to show that if a selective service registrant receives those procedural rights which this Court has declared are the entitlement of welfare recipients, *Goldberg* v. *Kelly, supra,* 397 U.S. at 269-271, the Selective Service System will be paralyzed and the nation will be left defenseless. The simple answer to all of this handwringing is that all that is involved in this case is the right to individually retained counsel at the personal appearance. But it is instructive

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[52] We have omitted from this delineation the other function of counsel at welfare termination hearings specified by this court in *Goldberg* v. *Kelly*, the role of counsel in conducting cross-examination. This is because there are not customarily any witnesses called by the Government at local board hearings, even though the local board has power to do so, 32 C.F.R. §1621.15.

In its attempt to belittle the possible usefulness of counsel in selective service proceedings, the Government contends that it cannot "be seriously argued that the presence of counsel is essential to the development of a suitable record for purposes of appeal . . ." Brief, p. 41. In making this statement, the Government appears to be utterly oblivious to the extensive remarks of this court in *Goldberg* v. *Kelly*, 397 U.S. at 269, n. 16, concerning the difficulties faced by the untutored and unsophisticated in preparing written submissions for appeals in administrative proceedings.

to note that one of the rhetorical questions: " . . . should the local board be required to state on the record its reasons for assigning a given classification . . . ?" has been answered decisively in the affirmative in at least eight of the circuits.[53]

The extent to which the Government is prepared to go in the propagation of the "non-adversary" myth is further revealed by its attempted reliance on *United States* v. *Nugent, supra,* Brief, pp. 49-51. It would appear that the Government is completely oblivious to the fact that the reason that *Nugent* was not a "right to counsel" case, Brief, p. 49, is that *Nugent* had an acknowledged right to counsel and the issue in the case was the extent of the additional procedural rights he should have. As we have pointed out previously, see *supra,* p. 64, and as revealed in this Court's opinion, 346 U.S. at 14, n. 3, Nugent had the right to counsel at his Justice Department hearing and was contending for the right to see the complete FBI reports, and not just a "fair resumé." 346 U.S. at 5-6.[54]

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[53] See *United States* v. *Deere,* 428 F.2d 1119 (2d Cir. 1970); *Paszel* v. *Laird,* 426 F.2d 1169 (2d Cir. 1970); *Scott* v. *Commanding Officer,* —— F.2d ——, 3 S.S.L.R. 3277 (3rd Cir. Sept. 15, 1970); *United States* v. *Broyles,* 423 F.2d 1299 (4th Cir. 1970); *O'Brien* v. *Resor,* 423 F.2d 594 (4th Cir. 1970); *United States* v. *James,* 417 F.2d 826 (4th Cir. 1969); *United States* v. *Washington,* 392 F.2d 37 (6th Cir. 1968), *United States* v. *Lemmens,* —— F.2d ——, 3 S.S.L.R. 3185 (7th Cir. Aug. 4, 1970); *Caverly* v. *United States,* 429 F.2d 92 (8th Cir. 1970); *Haughton* v. *United States,* 413 F.2d 736 (9th Cir. 1970); *United States ex rel. Brown* v. *Resor,* —— F.2d ——, 3 S.S.L.R. 3188 (10th Cir. July 21, 1970).

[54] Perhaps aware of the fact that Nugent had the right to counsel at his Department of Justice hearing, the Government finds it necessary to question whether the Department of Justice hearing was indeed a hearing. There is no other way to explain the typographically odd manner in which the word hearing is presented in quotation marks on the three occasions that the word is used in connection with the *Nugent* case. Brief, p. 50 and footnote 40, pp. 49-50.

Obviously, there is no issue in this case, as there was in *Nugent,* of "collateral attack" on testimony obtained in a prehearing investigation, since the local board is obliged to act only on material which is in the registrant's file, 32 C.F.R. §1623.1(b). Since the abandonment of the Department of Justice hearings, the special problems involved in FBI investigations and resumés thereof are no longer present. The problems facing the registrant before the board are precisely those with which counsel can assist him: delineating the issues, presenting the facts in an orderly manner, and generally safeguarding his interests. The Government has suggested no reason why counsel cannot play the same constructive and helpful role in a local board personal appearance as counsel played in thousands of Department of Justice hearings, such as that which was the subject of litigation on another point in *United States* v. *Nugent, supra.*[55]

The Government suggests that this Court should follow the "constitutional approach" which it claims was followed in *Nugent,* and that such approach is to balance the neces-

[55] Footnote 43 of the Government's brief (p. 51) suggests that the court below erred in not recognizing "that procedures of local board proceedings have undergone no basic change since the *Nugent* decision." See A. 35. We respectfully suggest that it is the Solicitor General who has misread the decision of the court below. Under the old procedures, a conscientious objector applicant had two personal confrontations, the first of which was his personal appearance before the local board, and the second his statutorily guaranteed Department of Justice hearing. Even though the recommendation of the hearing officer and of the Department of Justice was only advisory, this advice was almost invariably followed by the appeal board. See Smith and Bell, *supra,* at 702; *Gonzales* v. *United States,* 364 U.S. at 72. Now that the entire Department of Justice hearing procedure has been eliminated, it is indeed true, as the court below observed, that in terms of hearings or appearances, the one before the local board is determinative. Consequently, the Solicitor General misses the point in suggesting that personal appearances "now" are no more determinative than "they were then." Brief, p. 51, n. 43.

sity for the due process rights there contended for with the danger of "litigious interruption" to the Selective Service System. Brief, p. 51. To begin with, this argument as applied to this case answers itself, since obviously it was not contended that the right of counsel which *Nugent* possessed would cause litigious interruption. Moreover, it can hardly escape notice that opponents of increased due process rights, whether the right of counsel or otherwise, have always warned of litigious interuption and similar dangers.[56] One can agree that the Government's advocacy of a balancing test is here appropriate, but still must conclude that the interests of the individual far outweigh any genuinely harmful effect to any governmental interest. As this

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[56] In footnote 42, the Government accuses the court below of a "misleading" statement concerning *Greene* v. *McElroy, supra.* Once again, any misleading here is by the Government. The court below merely observed that this court in *Greene* v. *McElroy* did not follow the argument of "litigious interruption" which was made in *Nugent.* The court below did not say that the argument was rejected, since in fact *Greene* v. *McElroy* was decided on the basis of lack of Congressional authorization. See *Point II, supra.* But the court below was clearly correct in observing that in respect of that argument *"Nugent* was not followed in *Greene."* A. 35.

It is also noteworthy that the Government does not respond to the further point made by the court below concerning the spectre of litigious interruption, i.e., the fact that counsel participates in hearings with respect to members of all of the armed services who claim conscientious objector status, and have been so participating for the past several years. See: Department of Defense Directive 1300.6, ¶VIB4 (May 10, 1968); Army Regulation 635-20, ¶4b(3) (July 31, 1970); Army Regulation 135-25, ¶7b(3) (June 17, 1970) (providing procedures for conscientious objectors within the Army National Guard and Army Reserve); Air Force Regulation 35-24, ¶8b(4) (May 1, 1970); Coast Guard Commandant Instruction 1900.2, ¶5 (Oct. 7, 1968); Marine Corps Order 1306.16B, ¶7b(4) (June 18, 1969); Department of the Navy Bupers Instruction 1900.5, ¶3 (July 18, 1968). If our regimented military institutions can manage to survive notwithstanding the allowance of retained counsel at in-service conscientious objector hearings, it is respectfully submitted that the civilian institutions of the republic will not capsize if counsel are permitted to assist registrants at local board personal appearances.

court observed in *Goldberg* v. *Kelly, supra,* concerning the existence of right of counsel:

> "We do not anticipate that this assistance will unduly prolong or otherwise encumber the hearing." 397 U.S. at 271.

Finally, the Government relies on three other cases, all of which did indeed specifically deny the right of counsel at various investigatory proceedings. See *In re Groban,* 352 U.S. 330 (1957), *Anonymous* v. *Baker,* 360 U.S. 287 (1959), *Madera* v. *Board of Education,* 386 F.2d 778 (2d Cir. 1967), *cert. denied* 390 U.S. 1028 (1968). Each of these cases is readily distinguishable on the basis of the valid differences between investigatory proceedings and adjudicative proceedings which were explained by this Court in *Hannah* v. *Larche, supra,* and which we discuss at pp. 43-45 above. In each of these cases, either no adjudication of status or right was taking place, or if it was, it was basically subsidiary to the overall fact-finding investigation. Indeed, in the *Groban* case, this Court cautioned that the section of Ohio law under review "may contain a constitutional flaw if it should be construed to authorize the exclusion of counsel" at that point at which the proceeding changed from one of investigation to one of adjudication. 352 U.S. at 335. Likewise, in *Anonymous* v. *Baker,* this Court pointed out that preliminary investigations of possible misconduct by members of the New York Bar could be constitutionally held without counsel only because the investigations were *preliminary* in nature.[57]

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[57] The Court also noted that a certain public interest was served by the very anonymity of the proceedings, similar to the public interest involved in the secrecy of a grand jury proceeding. Moreover, the Court observed that the possibilities for abuse were limited by the fact that a high judicial officer presided at the investigation. 360 U.S. at 291, 296.

With respect to the New York City Board of Education Guidance Conference involved in *Madera* v. *Board of Education, supra,* the Court of Appeals found this even further removed from the status of an adjudicatory proceeding. The court clearly held that this was "a very preliminary investigation, if it can be considered an investigation at all." 386 F.2d at 785. The court observed further that due process might indeed require right to counsel "before a child is expelled from public school," *id.* at 788, but it was not called upon to resolve that question. There was no right to counsel at a disciplinary Guidance Conference, the Second Circuit held, because "after the conference, aside from a school reassignment, if any, a whole series of further investigations, hearings, and decisions must occur . . . ", *id.* at 785, before any of the child's rights might be affected.[58]

3. Because of the Narrowly Circumscribed Judicial Review of Selective Service Classification Actions and the Inevitable Criminal Prosecution for Induction Refusal Which Follows a Denial of a Conscientious Objector Application, a Conscientious Objector Applicant's Personal Appearance Before His Local Board Is a "Critical Stage" of the Pre-Prosecution Events During Which He Is Entitled to the Right of Counsel Under the Sixth Amendment.[59]

It is by now axiomatic in the field of selective service law, that the scope of judicial review is the narrowest known to

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[58] The court below observed that *Groban* and *Madera* were clearly distinguishable because in both instances the administrative action involved was nonadjudicative and nondispositive. A. 38-39. Curiously, the Government fails to meet this argument. Subsequent to *Madera,* the New York State Legislature has provided for the right to retained counsel at suspension proceedings. See N.Y. Education Law, §3214, Subdivision 6c, as amended, Ch. 307, McKinney's New York Session Laws 1969.

[59] The Government observes (Brief, p. 35) that neither the appellee nor the district court suggested that the Sixth Amendment

administrative law. The classification assigned by the local board may be overturned by a court only if it has "no basis in fact." Both the Selective Service System and the Department of Justice continually remind both the courts and defendants that the decisions of the local boards, made in conformity with the regulations, are final if they have a basis in fact, and that courts are not to search the records, sitting as "super draft boards"; the decision of the local board made in conformity with the regulations must be upheld even though it is erroneous. See generally, *Estep* v. *United States,* 327 U.S. 114 (1946); *Cox* v. *United States,* 332 U.S. 442 (1947); *Swaczyk* v. *United States,* 156 F.2d 17 *cert. denied* 329 U.S. 726 (1946); *Rempel* v. *United States,* 220 F.2d 949 (10th Cir. 1955); *Blalock* v. *United States,* 247 F.2d 615 (4th Cir. 1957); *De Remer* v. *United States,* 340 F.2d 712 (8th Cir. 1965). Typical of the long line of cases upholding this stringent scope of review is *United States* v. *Corliss,* 280 F.2d 808, 810-811 (2d Cir.), *cert. denied* 364 U.S. 884 (1960). There the Second Circuit held:

> "In discharging this unenviable task, courts must be mindful that 'The range of review is the narrowest known to the law,' [citing *Blalock, supra*]; . . . they may reverse the Appeal Board 'only if there is no basis in fact for the classification . . . ,' [citing *Estep, supra*] . . . ; and that '*any* fact which casts doubt on the veracity of the registrant is relevant,' *Witmer* v. *United States,* 348 U.S. 375, 381-2 (1955)." (Emphasis added.)

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has any applicability. It is clear, however, that appellee may urge before this court any additional grounds, constitutional or otherwise, for upholding the decision below. See *Dandridge* v. *Williams,* 397 U.S. 471, fn. 6 at 475-476 (1970).

See generally L. HERSHEY, LEGAL ASPECTS OF SELECTIVE SERVICE 53, fns. 33-40 (Revised ed. 1969).[60]

Consequently, the hearing before the local board is of vital importance because it is this critical stage at which the record is made, and from which there is only the most frustratingly narrow judicial review. See *United States* v. *Freeman,* 388 F.2d 246, 249 (7th Cir. 1967). See also, *Mulloy* v. *United States,* 398 U.S. 410 (1970). At the same time, because of the limited access to judicial review, see *Clark* v. *Gabriel,* 393 U.S. 256 (1968), and the well-known fact that most conscientious objector applicants must, as a matter of conscience, refuse induction if their claims are not sustained by the Selective Service System, virtually every conscientious objector case develops into a criminal prosecution for induction refusal. "A sincere claimant for conscientious objector status cannot turn to the habeas corpus remedy because his religious belief prevents him from accepting induction under any circumstances." *United States*

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[60] The position of the Selective Service System is stated in no uncertain terms in its authoritative guidebook for government appeal agents and prosecutors:

> "The United States Supreme Court has held that the courts are not to sit as super draft boards substituting their determinations for those of the classifying boards. Decisions of the boards made in conformity with the regulations are final even though erroneous. The administrative proceedings should be overturned only if there is a denial of basic procedural fairness or if the classification is without any basis in fact. The question of the preponderance of the evidence is not for trial anew and courts should not look for substantial evidence to support the classification. Courts are not to weigh the evidence to determine whether the classification was justified. They are confined to a review of the registrant's file in deciding whether there is a basis in fact. When a court finds a basis in the file for the board's action, that finding is conclusive." HERSHEY, *supra* at p. 71.

v. *Freeman,* 388 F.2d at 248-249. "A denial of a I-O claim will *usually* be decided in the courts, normally as a prosecution when the registrant fails to report or submit to induction." Memorandum from the New York City Director of Selective Service to the Selective Service Appeals Board, October 10, 1967 (emphasis in original).[61] Cf. *Mathis* v. *United States,* 391 U.S. 1, 4 (1966) (" . . . tax investigations frequently lead to criminal prosecutions, just as the one here did").

The juxtaposition of limited judicial review with denial of right of counsel at the local board personal appearance has produced agonizing frustration for large numbers of conscientious objector applicants, a frustration which appears to be shared by some federal courts. As the Seventh Circuit stated in *United States* v. *Freeman, supra*:

> "The danger posed by this narrow scope of review is particularly acute when a claim for conscientious objector status is made [citation omitted]. A sincere claimant for conscientious objector status cannot turn to the habeas corpus remedy because his religious belief prevents him from accepting induction under any circumstances. As a result he is limited to seeking review in a criminal trial for refusal to submit. In this criminal proceeding, as in any proceeding reviewing a draft classification, his defense of invalid classification is tested by the 'basis in fact' formula. Under these circumstances conviction is almost inevitable, since the Board's refusal to grant the conscientious objector classification is based on an inference as to

[61] A copy of this unpublished memorandum is in the possession of counsel for the appellee.

> the sincerity of the registrant's belief and there will almost always be something in the record to support an inference of lack of sincerity." 388 F.2d at 248-249.

Accord, United States v. *Wierzchucki,* 248 F. Supp. 788, 789 (W.D. Wisc. 1965) (". . . criminal conviction is virtually inevitable because the die has been cast irrevocably in the administrative proceedings. . . .") That many other federal judges have been troubled by the same "closed circuit" that provoked Judge Doyle's opinion in *Wierzchucki, id.* at 790, is revealed in the cases cited *supra* at pp. 54-55. In effect this "closed circuit" emasculates a federal court in redressing a miscarriage of justice, unless it can find some way of escaping its jurisdictional confinement. We respectfully submit that the result is not only a denial of justice in many cases, but perhaps even more profoundly a denial of the appearance of justice. See Mr. Justice Frankfurter, concurring in *Joint Anti-Fascist Refugee Committee* v. *McGrath,* 341 U.S. 123, 149, 172 (1951), stressing "the feeling, so important to a popular government, that justice has been done." In a footnote, Mr. Justice Frankfurter quoted with approval the thoughts of others to the same effect:

> "'In a government like ours, entirely popular, care should be taken in every part of the system, not only to do right, but to satisfy the community that right is done.' 5 The Writings and Speeches of Daniel Webster, 163. The same thought is reflected in a recent opinion by the Lord Chief Justice. A witness in a criminal case had been interrogated by the court in the absence of the defendant. Quashing the conviction, Lord Goddard said: 'That is a matter which cannot possibly be justified. . . . Time and again this court has said that justice must not only be done but must manifestly be seen

to be done. . . .' Rex v. Bodmin Justices [1947] KB 321, 325, [1947] 1 All Eng 109." 341 U.S., fn. 19 at 172.

In the face of this human and judicial frustration, a possible exit from the maze is suggested by the trend of this Court's recent decisions on right to counsel under the Sixth Amendment. The right to counsel in a criminal proceeding is, of course, not limited to the trial. See *Coleman* v. *Alabama,* 399 U.S. 1 (1970). This Court held in *United States* v. *Wade,* 388 U.S. 218, 226 (1967):

> ". . . [T]he accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial."

The principle of *Powell* v. *Alabama,* 287 U.S. 45 (1932), and its progeny, "requires that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial . . . and to have the effective assistance of counsel at the trial itself." *United States* v. *Wade,* 388 U.S. at 227 (Emphasis added).

This Court has also noted "that certain legal rights may be lost if not exercised" at the critical stage. *Mempa* v. *Rhay,* 389 U.S. 128, 135 (1967). Compare: *United States* v. *Wierzchucki, supra*:

> "When criminal conviction is virtually inevitable because the die has been cast irrevocably in the administrative proceedings . . . the right to counsel in the criminal proceeding may be a hollow thing." 248 F. Supp. at 789.

Thus, the situation in a selective service prosecution is a strikingly accurate illustration of the comment made by this Court in *Escobedo* v. *Illinois*, 378 U.S. 478, 487-488 (1964):

> ". . . [T]he 'right to use counsel at the formal trial [would be] a very hollow thing [if], for all practical purposes, the conviction is already assured by pretrial examination.' [Citing Black, J., dissenting in *Groban, supra*] 'One can imagine a cynical prosecutor saying: "Let them have the most illustrious counsel, now. They can't escape the noose. There is nothing counsel can do for them at the trial."' *Ex parte Sullivan*, 107 F. Supp. 514, 517-518 (D. Utah 1952)." [62]

The argument for recognizing a local board personal appearance as a "critical stage" of an ensuing induction refusal prosecution is at least as strong as the argument for recognition of the right to counsel at a police lineup, *United States* v. *Wade, supra,* or at an income tax investigation, *Mathis* v. *United States, supra.* The language of this Court in *Wade* provides an almost perfect description of the status of the frustrated conscientious objector applicant who is denied counsel at his local board personal appearance and who finds himself in a federal court seeking to defend a prosecution for induction refusal on the grounds of the wrongful denial of his conscientious objector classification:

> "The trial which might determine the accused's fate may well not be that in the courtroom but that at the

[62] In *Gonzales* v. *United States*, 348 U.S. 407, 417 (1955), this Court noted that certain procedural rights for conscientious objector claimants must be afforded prior to determination being made by the appeal board, since otherwise it would be "too little and too late."

pretrial confrontation, with the State aligned against the accused, the witness [local board] the sole jury, and the accused unprotected against the overreaching, intentional or unintentional, and with little or no effective appeal from the judgment there rendered by the witness [local board]. . . ." 388 U.S. at 235-236.

Appellee's counsel recognize that most of the prior discussion of right to counsel at local board personal appearances, or similar hearings in other administrative agencies, has involved Fifth Amendment considerations. We recognize also that for a selective service registrant who is not a conscientious objector applicant, the Sixth Amendment argument may not be as compelling. We respectfully submit, however, that where hopelessly narrow judicial review by criminal prosecution is linked so inextricably and inevitably to a denial of administrative relief at a hearing from which counsel is barred, a Sixth Amendment claim is made which cannot be denied. Accordingly, while we recognize that this Court can rule in appellee's favor on either Fifth Amendment or Sixth Amendment grounds, we urge that the question is of sufficient importance for the Court to rule on both grounds.

4. *Counsel Can Play a Useful and Constructive Role at Local Board Personal Appearances; Removing the Present Prohibition Would Cause No Real Danger of Litigious Interruption.*

The function of counsel at a local board personal appearance would be much the same as that noted by this Court in *Goldberg* v. *Kelly*, 397 U.S. 254, 270-271 (1970): delineating the issues, presenting the facts in an orderly manner, and safeguarding the registrant's interests. That a registrant has a real need for this assistance is conclusively

demonstrated by a review of the multiplicity of factual, legal and discretion-exercising questions on which the local boards must rule. See Section 1, *supra*, pp. 37-41.[63]

Perhaps the most useful role which counsel can play at a local board personal appearance is to safeguard the registrant's interests. Unfortunately, these are interests very much in need of being safeguarded. The registrant needs to be protected against innocent acts or omissions which can harm him, such as ignorance of the regulations or of their interpretation, and consequent violation of them. See *United States* v. *Baker*, 1 S.S.L.R. 3017 (E.D.N.Y. 1968); *United States* v. *Burns*, —— F.2d ——, 3 S.S.L.R. 3191 (10th Cir. 1970); *United States* v. *Harris*, 302 F. Supp. 1194 (D. Ore. 1968); *United States* v. *Harte*, —— F. Supp. ——, 3 S.S.L.R. 3193 (N.D. Ill. 1970). The registrant, likewise, needs protection from unwarranted paternal[illegible]

[63] Footnote 28 of the Government's brief seems to concede the useful role that counsel can play in assisting in the paperwork, but does not appear to answer the obvious question as to why counsel could not be equally or more constructive and helpful if allowed to appear with the registrant at the personal appearance. Suppose a board member does not understand one of the points sought to be made by the registrant in drawing up, with counsel's help, the various "affidavits, written supporting statements and other documentation"? Suppose that a local board member draws from the file some other document which appears to be inconsistent with the claim made in an affidavit or document submitted by the registrant, after being prepared with counsel's assistance? We respectfully submit that the Government's position that counsel may assist except where he is most needed is either cynical, *cf. Escobedo* v. *Illinois*, 378 U.S. at 487-488, or naively ignorant of what actually happens at a local board. On its face, moreover, the proposition is contrary to logic and common sense. "The prohibition of attorneys in hearings doesn't mean a young man doesn't have legal advice. It just means that he may not have it when he needs it most." Testimony of former Attorney-General Clark, in *The Selective Service System: Its Operation, Practices, and Procedures*, Hearing before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 91st Cong., 1st Sess., Nov. 3, 1969, p. 153.

board members; see *Caverly* v. *United States*, 429 F.2d 92, 94 (8th Cir. 1970) (Where the local board had refused I-O classification because, *inter alia*, "immediate induction would solve the registrant's social problems and materially aid his mental maturation process"). But the registrant is most in need of protection against the all-too-frequent non-innocent manifestations of prejudice and hostility. See *Penner* v. *United States*, 399 U.S. 522 (1970), reversing 420 F.2d 344 (10th Cir. 1970), upon confession of error by the Solicitor General;[64] *Capobianco* v. *Laird*, 424 F.2d 1304 (2d Cir. 1970); *United States* v. *Cabbage*, —— F.2d ——, 3 S.S.L.R. 3179 (6th Cir. 1970); *United States* v. *Gustavson*, —— F. Supp. ——, 3 S.S.L.R. 3099 (N.D. Ill. 1969); see also *Dickinson* v. *United States*, 346 U.S. 389 (1953); *Walsh* v. *Local Board No. 10*, 305 F. Supp. 1274, 1279 (S.D.N.Y. 1969).[65]

Nor is there any basis in reality to the Government's cries of alarm (Brief, pp. 43, 45, 47) that removing the prohibition of counsel will cause a paralysis in the Selective Service System. As we have noted previously, counsel's appearance and assistance at Department of Justice hear-

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[64] The Solicitor General confessed error because of a "nagging doubt," see Memorandum for the United States, Oct. Term, 1969, No. 1532, p. 8, that justice had not been done in the case of a third generation Mennonite, second generation conscientious objector, who was denied I-O classification by a local board because of its blanket policy of granting only I-A-O classifications and leaving all questions about I-O classifications to the appeal board; the Presidential Appeal Board removed the I-A-O classification and classified Penner I-A. His conviction and five-year sentence were upheld by the Tenth Circuit; this Court reversed, remanded and directed dismissal of the indictment.

[65] Cf. the amazing statistical revelation by the National Advisory Commission on Selective Service (the Marshall Commission) that 55% of the local board members of one state (unidentified) did not believe that conscientious objectors should be deferred at all. REPORT, p. 29.

ings was recognized for some twenty years.[66] Whatever complaints there were, the slowness of the procedure has never been attributed to the presence of counsel.[67]

This Court has declared that the right of counsel must be recognized at welfare termination hearings, see *Goldberg* v. *Kelly, supra,* discounting the likelihood of litigious interruption. It is doubtful that the number of conscientious objector applicants who will seek to have counsel present at local board personal appearances will exceed the number of welfare recipients who will take advantage of their newly-granted right to counsel.

There is, moreover, a very simple answer to any problem which may arise should it appear that the presence of counsel requires more time of local board members at each personal appearance than otherwise. Under Section 1604.52 a(a) of the regulations, the state director is authorized to establish panels of each local board "in such number as he may determine . . . " and each such panel is vested with all of the jurisdiction possessed by the board. It is well-known that many metropolitan area local boards with large numbers of registrants have made liberal use of this provi-

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[66] The Chief of the Department of Justice conscientious objector program reported in 1958 that some 10,000 hearings had been held since 1948. Smith and Bell, *supra,* at 702. There is no indication, however, of the extent to which registrants took advantage of their right to have counsel at their Justice Department hearings.

[67] The slowness of the old procedure, which led to some adverse congressional comment and the elimination of the Department of Justice role, was principally attributed to the time which it took to complete FBI investigations and to prepare resumés thereof. There is no suggestion anywhere in the House Report recommending elimination of the hearing or in any of the other material which counsel has reviewed that the presence of counsel at the Department of Justice hearings had either a derogatory or a dilatory effect. See H.R. Rep. No. 267, 90th Cong., 1st Sess., pp. 31, 45-46.

sion, allowing for additional board members to handle additional board business.[68]

Rather than an adverse effect, as balefully predicted by the Government, the presence of counsel can well have a constructive and time-saving effect. See *United States* v. *Wade*, 388 U.S. 218, 238 (1967). See also, *Menechino* v. *Oswald*, —— F.2d ——, No. 34665 (2d Cir., August 5, 1970), where the Second Circuit observed that a useful role can be played by an attorney or social worker representative at a parole revocation hearing in obtaining and presenting additional and relevant evidence and helping to "protect against bad decisions or misinformation or lack of adequate information." Slipsheet Opinion, footnote 2, pp. 4088, 4089.[69]

In *United States* v. *Wade*, *supra*, this Court recognized that the presence of an attorney at a critical stage of the pretrial proceeding can play a useful role in monitoring the low-visibility decision-making which occurs at that stage. Such monitoring is equally necessary to expose to view the otherwise hidden levels of administrative adjudication. See Handler, *Controlling Official Behavior in Welfare Administration*, 54 CAL. L. REV. 479 (1966); DAVIS AND DOLBEARE, LITTLE GROUPS OF NEIGHBORS: THE SELECTIVE SERVICE SYSTEM (1968). The enormous powers over personal and property rights vested in the local boards, see Section 1,

[68] Two of the largest local boards in the Greater New York area, Mount Vernon Local Board No. 10 and Great Neck Local Board No. 3, have respectively 3 and 5 panels of five members each.

[69] The Second Circuit mentioned another reason why counsel can be useful which is equally applicable to an appearance before a local board: "Furthermore, he [the applicant] is unlikely because of nervous tension to be able to express himself as logically to the Board as he might in a different setting." *Menechino* v. *Oswald*, *supra*.

supra, pp. 37-41, and the unhappy record of the virtually unchecked and unreviewable exercise of these powers, see Section 3, *supra,* and cases cited, pp. 81-83, demonstrate how far removed the situation is from the proper conditions for informal administrative procedures:

> "The extension of unconventional processes presupposes a subordinate personnel equipped to use them fairly and an administrative hierarchy fired with a sense of responsibility for scrupulously just results." GELLHORN AND BYSE, ADMINISTRATIVE LAW, 664-665 (1954 ed.).

5. The Registrant's Constitutional Right to Counsel Is Not Satisfied by the Government Appeal Agents or the Optional Provision of Advisors to Registrants.

Since the Government does not propose that either the Government Appeal Agent or the "advisor to registrants" be permitted to appear at the local board personal appearance whenever the registrant wishes to have counsel with him, it is hardly necessary to refute the contentions made concerning the functioning of these persons. Moreover, if the selective service regulations were to be amended so as to provide that the prohibition of counsel would be inapplicable to officially-appointed Government Appeal Agents and advisors, and to provide further that such persons and such persons only could represent registrants at personal appearances, this would raise other constitutional questions about the right to privately retained counsel of one's own choice rather than the compulsion to accept the Government-designated lawyer. It is clear that where the right to counsel exists, one may not be forced into accepting state-appointed counsel when he has retained counsel of his own. *Gomez* v. *Heard,* 218 F. Supp. 228 (S.D. Texas

1962), *aff'd* 321 F.2d 88 (5th Cir. 1963). See also, *Powell* v. *Alabama,* 287 U.S. 45, 53 (1932) (the right of an accused to counsel includes "a fair opportunity to secure counsel of his own choice"); *Chandler* v. *Fretag,* 348 U.S. 3 (1954); *Crooker* v. *California,* 357 U.S. 433 (1958).[70]

It is the Government's position that (a) there is no constitutional impediment to prohibiting counsel at local board personal appearances, and (b) such legal needs as registrants have are amply satisfied by the provisions of Government Appeal Agents and advisors to registrants. Brief, p. 41, footnote 28. Somewhat inconsistently, the Government argues that private counsel can perform the same services as Government Appeal Agents and advisors to registrants. *Id.* Thus, the Government does not really meet the constitutional due process question of whether the right to counsel means the right to effective counsel, appearing in person with the client before the decision makers.

Nevertheless, it may be useful to set out the total inadequacy of Government Appeal Agents and advisors to registrants. First, insofar as concerns advisors to registrants, see 32 C.F.R. §1604.41, these functionaries if they ever existed, are optional and have been optional since 1955, as the Government concedes. Brief, p. 32, footnote 22. The utter failure of the system to provide advisors to registrants was scornfully noted by the Marshall Commission, see Report, pp. 28, 29, and also by courts, both when the requirement was mandatory, *Steele* v. *United States,* 240

[70] The Uniform Code of Military Justice, 10 U.S.C.A. §838b, provides, in part: "The accused has the right to be represented in his defense before a general or special court-martial by civilian counsel if provided by him, or by military counsel of his own selection if reasonably available, or by the defense counsel detailed under Section 827 of this title (article 27) • • • ."

F.2d 142 (1st Cir. 1956), and after the requirement became optional. See *United States* v. *Spiro*, 384 F.2d 159 (3rd Cir. 1967); *United States* v. *Heljenek*, 275 F. Supp. 579, 589 (E.D. Pa. 1967); see also, *United States* v. *Harris*, 302 F. Supp. 1194, 1196 (D. Ore. 1968).

Insofar as concerns Government Appeal Agents, a number of obvious deficiencies and inadequacies were noted by the court below. A. 40-41.[71] The main problem with the Government Appeal Agents, however, is not the inadequacy

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[71] Under 32 C.F.R. §1604.71, Appeal Agents need not be lawyers and cannot appear before the board except when requested by the board. Moreover, Section 1604.71(d)(5) "injects such a conflict of interest into any representation the appeal agent may provide that it is doubtful that he could act for the registrant in the role of an attorney." A. 41. Further, with respect to the appeal agent's conflict of interest, seee Layton, *Lawyers Cannot Be Informants*, 54 ABAJ 153, 154 (1968); ABA Informal Opinion No. 1026; ABA Informal Opinion No. 287. This court has clearly instructed bench and bar against allowing the representation of conflicting interests. See, e.g., *Glasser* v. *United States*, 315 U.S. 60, 68-72 (1942). See also the following pertinent provisions from the ABA Code of Professional Responsibility:

> "EC4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client * * *."
>
> "EC4-5 A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client and a lawyer should not use, except with the consent of his client after full disclosure, such information for his own purposes * * *"
>
> "EC5-1 The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."
>
> "EC5-14 Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his

of representation arising from a possible conflict of interest, see *United States* v. *Williams,* 420 F.2d 288 (10th Cir. 1970) (Appeal Agent employed by registrant's wife in contested divorce action); or the inadequacy of representation because of identification with the board and a paternalistic attitude to the registrant, see *United States* v. *DeLime,* 223 F.2d 96 (3rd Cir. 1955) (Government Appeal Agent indistinguishable from board members in unfriendly examination of registrant). The main problem over the years has been the simple invisibility and unavailability of the Government Appeal Agents, even to perform such services for the registrant as the regulations allow. The Marshall Commission's acerbic observation is most appropriate:

> "The Selective Service System contains more than 8,000 advisers, whose task is to assist men at the time of their registration (by providing information, answering questions, and so forth), and some 4,000 appeal agents to aid registrants who wish to appeal. These men, like the board members themselves, are not compensated. They are also the most elusive components of the entire System. The research team which reported the results of its intensive one-state study told the Commission: 'The clear fact is . . . that appeal agents are almost totally inactive. Most board members barely know who their appeal agent is and cannot recall when he was last in the office. Clerks freely admit that their appeal agents have checked no files, seen no registrants, made no appeals in years. What advising

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judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who may have differing interests, whether such interests be conflicting, inconsistent, diverse or otherwise discordant."

(Adopted by ABA House of Delegates, Aug. 12, 1969, effective Jan. 1, 1970.)

of registrants there is, must be done by clerks or by an occasional private attorney. Most registrants are probably quite unaware that there are appeal agents in the System.' The team concludes: 'We doubt that this is peculair [*sic*] to our State.' The Commission, on the evidence presented to it, shares that doubt. The condition appears to be uniform throughout the System—indeed, perhaps, it is its most uniform characteristic." REPORT, pp. 28-29.

6. *There Is a Corps of Private Counsel Competent in Selective Service Matters and Available to Perform These Necessary Functions.*

The Government suggests that there might be some unfairness in a system where registrants who could afford private counsel would be represented while indigent registrants would not. Brief, pp. 27, 30, 40, n. 28. It is a curious logic which worries about the availability of counsel to indigent registrants and argues that, therefore, counsel should be available to none.

If the Government is truly concerned about meeting such disparity as exists, the problem can be easily resolved by an amendment to the regulations which would authorize the Government Appeal Agents—and advisors to registrants—to appear before local boards representing registrants at the registrants' request.[72]

But the Government's commendable concern for the welfare of registrants unable to afford private counsel need trouble it no longer. There is in existence a selective service

[72] Indeed, the Government seems to recognize this natural sharing of responsibility—in terms of legal services to registrants other than local board appearances—by the retained counsel for those who can afford it and by the Government Appeal Agent and the advisor to registrants for those unable to afford counsel. Brief, p. 40, n. 28.

bar which fully recognizes its responsibility to provide free professional services to those who cannot afford privately retained attorneys.

In addition to the already existing structure of legal aid and public defender services available throughout the country, there is also a vast superstructure of selective service legal counseling which far exceeds the free legal services available in other areas of the law where this Court has held that persons are entitled to be represented by counsel.

The Office of Economic Opportunity lists 283 legal services projects which it funds (OEO Pamphlet 6140-2). One such project is Community Action for Legal Services, Inc. (CALS) in New York, which has 26 offices throughout New York City, and employs 150 attorneys full time. CALS, in its brochure "WE CAN HELP," states that it provides "counseling and representation before draft boards" for indigent draft registrants.[73]

New York City also has a panel of approximately 125 lawyers affiliated with the New York Civil Liberties Union who provide free counseling and representation for draft registrants. There are similar panels of selective service law-

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[73] See the statement of Donald M. Stocks, Deputy Director of the Legal Service Program, in *Right of Counsel in the Selective Service System*, Hearing before the Subcommittee on Administrative Practice and Procedure of the Committee on the Judiciary, United States Senate, 90th Cong., 2d Sess., May 16, 1968, at p. 94:

> Mr. Stocks: We provide legal services to persons who are unable to afford other counsel. The attorneys would be available to provide legal counsel to any person appearing before the draft board who reaches the eligibility standards.
>
> That is, basically, those persons who are unable to pay for private legal counsel.
>
> * * * * *
>
> Senator Long: In other words, you think your organization will be in a position to furnish counsel to registrants who were not able to employ them?
>
> Mr. Stocks: Yes; we do.

yers providing free services in every major city in the United States. These panels include over 100 lawyers each in the cities of Chicago, Los Angeles and San Francisco. There are also panels in operation in Boston, Philadelphia, Washington, Detroit, Denver and Seattle.[74] The Selective Service Law Reporter, published by the Public Law Education Institute, has 1200 "special subscribers" (i.e. subscribers who pay a special rate because they provide free counseling services). TATUM AND TUCHINSKY, GUIDE TO THE DRAFT (1969), on pages 272-281, lists 123 organizations providing free draft counseling and representation throughout the country. See also RIVKIN, GI RIGHTS AND ARMY JUSTICE: THE DRAFTEE'S GUIDE TO MILITARY LIFE AND LAW, 360-370 (1970).

In addition to services by practicing lawyers, there is also the possibility of representation by many thousands of expertly trained laymen who now provide selective service counseling. See dissenting opinion of Justice Douglas in *Hackin* v. *Arizona,* 389 U.S. 143 (1967); cf. S.S.L.R. ¶1005.

7. *Conclusion of Point III.*

We respectfully submit that the foregoing discussion ineluctably leads to the conclusion that

> ". . . without the right at least to counsel, the classification proceeding today, under present circumstances, is a snare and a delusion, a farce committed upon an unsuspecting public, and a violation of one's most important of constitutional rights. . . ."

Forkosch, *supra,* 22 So. CAR. L. REV. at 343.

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[74] Appellee's counsel are personally familiar with the existence and operation of many of these panels.

CONCLUSION

For the reasons stated, the judgment of the district court should be affirmed.

November, 1970.

Respectfully submitted,

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APPENDIX A

Pursuant to Rule 40(3) of the Rules of this Court, the following statute, selective service regulations (in addition to those set forth in Appendix A of appellant's brief), and Department of Defense Directive are set forth:

1. Section 6(j) of the Selective Service Act of 1948 (former 50 U.S.C. App. §456(j)), 65 Stat. 83, provided in pertinent part:

> "Any person claiming exemption from combatant training and service because of such conscientious objections shall, if such claim is not sustained by the local board, be entitled to an appeal to the appropriate appeal board. Upon the filing of such appeal, the appeal board shall refer any such claim to the Department of Justice for inquiry and hearing. The Department of Justice, after appropriate inquiry, shall hold a hearing with respect to the character and good faith of the objections of the person concerned, and such person shall be notified of the time and place of such hearing. The Department of Justice shall, after such hearing, if the objections are found to be sustained, recommend to the appeal board that (1) if the objector is inducted into the armed forces under this title, he shall be assigned to non-combatant service as defined by the President, or (2) if the objector is found to be conscientiously opposed to participation in such non-combatant service, he shall be deferred. If after such hearing the Department of Justice finds that his objections are not sustained, it shall recommend to the appeal board that such objections be not sustained. The appeal board shall, in making its decision, give

consideration to, but shall not be bound to follow, the recommendation of the Department of Justice together with the record on appeal from the local board."

2. 32 C.F.R. 1604.52, 1604.52a(a), 1604.54, 1604.55, 1604.57, 1604.58, 1621.15, 1622.1(c), and 1622.20(a) provide:

1604.52 *Composition and Appointment.*—(a) A local board of three or more members shall be appointed for each local board area by the President upon recommendation of the Governor.

(b) A local board of three or more members, with at least one member from each county included within the intercounty local board area, shall be appointed for each intercounty local board area by the President upon recommendation of the Governor.

(c) The members of local boards shall be citizens, male or female, of the United States who shall be residents of a county in which their local board has jurisdiction. No member of a local board shall be a member of the armed forces or any reserve component thereof. Members of local boards shall be at least 30 years of age.

(d) No member shall serve on any local board for more than twenty-five years, or after he has attained the age of seventy-five years.

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1604.52a *Panels of Local Boards.*—(a) Whenever the State Director of Selective Service determines that the work load of a local board has become too great to be handled without undue delay, he is authorized to establish panels of such local board in such number as he may determine, but not to exceed one panel for each

three local board members. The jurisdiction of each such panel shall be the same as the jurisdiction of the local board subject to the limitations contained hereafter in this section.

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1604.54 *Jurisdiction.*—The jurisdiction of each local board shall extend to all persons registered in, or subject to registration in, the area for which it was appointed. It shall have full authority to do and perform all acts within its jurisdiction authorized by the selective service law.

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1604.55 *Disqualification.*—(a) No member of a local board shall act on the case of a registrant who is his first cousin or closer relation, either by blood, marriage, or adoption, or who is an employee or employer, or who is a fellow employee, or stands in the relation of superior or subordinate in connection with any employment, or is a partner or close business associate of the member. If because of this provision a majority of a local board cannot act on the case of a registrant, the local board shall request the State Director of Selective Service to designate another local board to which the registrant shall be transferred for action on his case.

(b) The local board shall be disqualified to consider the classification of any registrant who is a government appeal agent, associate government appeal agent, advisor to registrants, or employee of such local board and in each such case it shall advise the State Director of Selective Service of its disqualification. The State Director of Selective Service shall then designate another local board to classify such registrant, and the

registrant shall be transferred for classification to the local board thus designated.

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1604.57 *Oath of Witnesses.*—A member of the local board shall administer the following oath to every person testifying before the local board:

> You swear (or affirm) that the evidence you give in the matter now in hearing shall be the truth, the whole truth, and nothing but the truth. So help you God.

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1604.58 *Minutes of Meetings.*—Each local board shall keep a record of each meeting of the board on Minutes of Local Board Meeting (SSS Form 112) which shall be filed by the local board as minutes of its meetings.

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1621.15 *Subpena Power of Local Board.*—To the extent necessary for carrying out its function, the local board shall have authority (a) to subpena any person to appear before it, (b) to direct such person to produce such papers and records as may be deemed necessary, and (c) to require him to testify, under oath, in regard to any pertinent matter within his knowledge. It shall be the duty of any person subpenaed to appear, to produce the papers and records described in the subpena, and to testify. The local board shall use for the purpose a Subpena to Witnesses to Appear Before Local Board (SSS Form 161). The original of such a subpena shall be served upon the individual who is required to appear as a witness. Such service may be made by any person who is 21 years of age or over, and it shall be made in the manner provided by the law

of the State in which the subpena is served. Any person subpenaed may be compelled to appear and testify before the local board in the same manner as persons subpenaed by a court of the United States may be compelled to appear and testify in proceedings before such court. The local board may apply to a court of the United States for summary aid to compel a person within its jurisdiction who has failed or refused to testify to appear before such local board, to produce such papers and records as may be deemed necessary, or to testify.

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1622.1 *General Principles of Classification.*—

(a) . . .

(b) . . .

(c) It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant will be considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board. The local board will receive and consider all information, pertinent to the classification of a registrant, presented to it. The mailing by the local board of a Classification Questionnaire (SSS Form 100) to the latest address furnished by a registrant shall be notice to the registrant that unless information is presented to the local board, within the time specified for the return of the questionnaire, which will justify his deferment or exemption from military service the registrant will be classified in Class I-A.

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1622.20 *General Rules for Classification in Class II.* —(a) On the local board is placed the responsibility, under applicable rules and regulations, of deciding which men should be deferred because of their civilian activities. It is in the national interest and of paramount importance to our national security that civilian activities which are contributing to the national health, safety, or interest should be disrupted as little as possible, consistent with the fundamental purpose of the Military Selective Service Act of 1967.

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3. Department of Defense Directive 1300.6, ¶VI B 4, provides:

"The [in-service] applicant [for discharge as a conscientious objector] will be afforded an opportunity to appear in person (with counsel retained by him, if he desires) before an officer in the grade of O-3, or higher, who is knowledgeable in policies and procedures relating to conscientious objector matters."

NOTE: Where it is deemed desirable, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

UNITED STATES *v.* WELLER

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. 77. Argued December 10, 1970—Decided February 24, 1971

Appellee, who claimed conscientious objector status, was refused representation by his attorney at the time of his personal appearance before his draft board on the basis of a Selective Service regulation prohibiting such representation. Subsequently indicted for refusing to submit to induction, appellee filed a motion to dismiss, contending that the denial of counsel had deprived him of due process. The District Court granted appellee's motion on the ground that the regulation was not authorized by the Military Selective Service Act of 1967. The United States filed a notice of appeal to this Court, but, after reconsidering and concluding that this Court lacked jurisdiction to entertain its direct appeal from the District Court's order, the United States moved for a remand to the Court of Appeals. Appellee contends that the "construction of the statute" dismissal provision or the "motion in bar" provision of the Criminal Appeals Act gives this Court jurisdiction of the appeal. *Held:*

1. This Court has no jurisdiction of the appeal under the "construction of the statute" provision since the interrelation of the regulation and the statute fell short of that required for the dismissal to have been based upon the construction of the statute. *United States* v. *Mersky*, 361 U. S. 431, distinguished. Pp. 4–5.

2. The "motion in bar" provision applies only when a defendant, while not denying the commission of the offense, claims that an extraneous factor forecloses prosecution. That provision is inapplicable here since appellee contends that his refusal to submit to induction was not a crime because of the denial of counsel by his draft board. Pp. 5–7.

309 F. Supp. 50, remanded.

STEWART, J., delivered the opinion of the Court, in which BURGER, C. J., and BLACK, HARLAN, BRENNAN, WHITE, MARSHALL, and BLACKMUN, JJ., joined. DOUGLAS, J., filed a dissenting opinion.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 77.—October Term, 1970

United States, Appellant, v. Thomas William Weller. } On Appeal From the United States District Court for the Northern District of California.

[February 24, 1971]

Mr. Justice Stewart delivered the opinion of the Court.

In this case we are called upon once again to construe the elusive provisions of the Criminal Apppeals Act, 18 U. S. C. § 3731.[1] Somewhat ironically, the argument that we have no jurisdiction over this appeal is made by

[1] The end of our problems with this Act is finally in sight. The Omnibus Crime Control Act of 1970, § 14 (a), 84 Stat. 1890 (1971), amended the Criminal Appeals Act to read in pertinent part as follows:

"In a criminal case an appeal by the United States shall lie to a court of appeals from a decision, judgment, or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution."

This Court's appellate jurisdiction of government appeals in federal criminal cases has thus been eliminated. Pending cases, however, are not affected, since subsection (b) of the amending section provides:

"The amendments made by this section shall not apply with respect to any criminal case begun in any district court before the effective date of this section."

The Omnibus Crime Control Act of 1970 took effect on January 2, 1971. The appellee in this case was indicted on January 15, 1969.

the appellant, the United States. The appellee, on the other hand, insists the case is properly here.

A grand jury in the United States District Court for the Northern District of California indicted the appellee for refusing to submit to induction into the Armed Forces, a violation of 50 U. S. C. App. § 462 (a).[2] In the Selective Service proceedings leading up to his induction notice, the appellee sought conscientious objector status. He specifically requested that his lawyer be allowed to accompany him at the time of his personal appearance before the board, but the board, relying on 32 CFR § 1624.1 (b), denied the request and conducted the personal appearance without the appellee's counsel present.[3] Subsequently, the board declined to reopen the appellee's I–A classification, and the appellee unsuccessfully exhausted administrative review. His order to report for induction, his refusal to submit, and this prosecution followed.

The appellee moved before trial to dismiss his indictment on the ground, among others, that the denial of counsel at the time of his personal appearance before the board deprived him of due process of law under the Fifth Amendment. The District Court did not squarely decide this constitutional claim, but granted the motion to dismiss on the ground that the regulation prohibiting

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[2] Military Selective Service Act of 1967, § 12 (a), 50 U. S. C. App. § 462 (a) (Supp. V, 1970), provides in pertinent part:

". . . any person . . . who . . . refuses . . . service in the armed forces . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . shall, upon conviction in any district court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both such fine and imprisonment . . . ."

[3] 32 CFR § 1624.1 (b) (1970) provides in pertinent part:

"[N]o registrant may be represented before the local board by anyone acting as attorney or legal counsel."

representation by counsel at a registrant's personal appearance was not authorized by the Military Selective Service Act. 309 F. Supp. 50. The court relied primarily upon *Greene* v. *McElroy*, 360 U. S. 474, in which our opinion underscored "the Court's concern that traditional forms of fair procedure not be restricted by implication or without the most explicit action by the Nation's lawmakers, even in areas where it is possible that the Constitution presents no inhibition." 360 U. S., at 508. Viewing the personal appearance as "a critical stage of an administrative process at which substantial rights are adjudicated," 309 F. Supp., at 51, the District Court found the various provisions of the Selective Service Act conferring rulemaking power on the Executive insufficient to authorize a regulation denying counsel at local board hearings.[4]

The United States filed a notice of appeal to this Court. Subsequently, the Government reconsidered its position and concluded that this Court lacked jurisdiction over the appeal. Accordingly, the Solicitor General filed a motion asking us to remand the case to the United States Court of Appeals for the Ninth Circuit. We postponed further consideration of the question of jurisdiction until the hearing of the case on the merits. 397 U. S. 985. We now conclude that this appeal is not properly here and, pursuant to the provisions of the Criminal Appeals Act, remand the case to the Court of Appeals.[5]

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[4] The District Court cited Military Selective Service Act § 10 (b) (3), 50 U. S. C. App. § 460 (b) (3) (Supp. V, 1970), and § 1 (c) of the Act, 50 U. S. C. App. § 451 (c). See also Military Selective Service Act §§ 5 (a) (1), 10 (b) (1), 50 U. S. C. App. §§ 455 (a) (1) (Supp. V, 1970), 460 (b) (1) (1964).

[5] See 18 U. S. C. § 3731 (1964):

. . . . .

"If an appeal shall be taken, pursuant to this section, to the Supreme Court of the United States which, in the opinion of that

The appellee urges that we have jurisdiction under either of two sections of the Act, one relating to dismissal of an indictment based on the construction of the statute on which the indictment is founded and the other to motions in bar.[6] Considering first the "construction of the statute" provision, the controlling precedent is this Court's decision in *United States* v. *Mersky*, 361 U. S. 431. In that case, as in this one, there were in issue both a statute and a regulation promulgated pursuant to it. In finding jurisdiction in *Mersky*, however, the Court noted that "neither the statute nor the regulations are complete without the other, and only together do they have any force. In effect, therefore, the construction of one necessarily involves the construction of the other. . . . When the statute and regulations are so inextricably intertwined, the dismissal must be held to involve the construction of the statute." 361 U. S., at 438.[7]

The relation between the Selective Service Act and the regulation forbidding representation by counsel before local boards is wholly different from the situation in *Mersky*. The regulation is not at all "called for by

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Court, should have been taken to a court of appeals, the Supreme Court shall remand the case to the court of appeals, which shall then have jurisdiction to hear and determine the same as if the appeal had been taken to that court in the first instance."

[6] *Ibid.*:

"An appeal may be taken by and on behalf of the United States from the district courts direct to the Supreme Court of the United States in all criminal cases in the following instances:

"From a decision or judgment . . . dismissing any indictment . . . where such decision or judgment is based upon the . . . construction of the statute upon which the indictment . . . is founded.

. . . . . .

"From the decision or judgment sustaining a motion in bar, when the defendant has not been put in jeopardy."

[7] The dissenting opinions would have found jurisdiction wanting in *Mersky*. 361 U. S., at 444, 453.

the statute itself," 361 U. S., at 438. Indeed, so independent are the statute and the regulation that it would be entirely possible for a regulation covering the same subject matter to provide exactly the reverse of what the present regulation requires. It cannot be said here that "the construction of one necessarily involves the construction of the other." Since this statute and this regulation fall so far short of being "inextricably intertwined," we conclude that the dismissal of the appellee's indictment was not "based upon the . . . construction of the statute." [8]

We turn, accordingly, to the "motion in bar" provision of the Criminal Appeals Act. Two preliminary observations are necessary. First, a "motion in bar" must be taken to mean whatever was meant by a "special plea in bar" in the Act as originally passed in 1907.[9] Second, this Court has never settled on a definitive interpretation of what constitutes a "motion in bar." [10]

During its debates on the Criminal Appeals Act in 1907, Congress paid relatively little attention to the "special plea in bar" section of the Act. The clearest

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[8] It is suggested in dissent that we have jurisdiction because of the language in 50 U. S. C. App. § 460 (b) (3) conferring upon local boards the power "to hear and determine" claims for exemption and deferment from military service. The record does not indicate that this statutory language was mentioned by the appellee in the District Court, and the court did not rely upon the "hear and determine" clause in dismissing the indictment. The theory of the dissent was not urged before this Court, perhaps because the parties realized that it can hardly be said that a dismissal of an indictment was "based upon" a construction of a statutory provision that the District Court never even considered.

[9] *United States* v. *Sisson,* 399 U. S. 267, 292–293 n. 22; Note 4 of Advisory Committee to Fed. Rule Crim. Proc. 54 (c), reprinted following Fed. Rule Crim. Proc. 54, 18 U. S. C. App. (1964).

[10] *United States* v. *Sisson,* 399 U. S., at 300 and nn. 53–54.

statement of its meaning was given by one of the bill's co-sponsors, Senator Patterson:

> "A special plea in bar is that which is set up as a special defense notwithstanding the defendant may be guilty of the offenses with which he is charged; it is for some outside matter; yet it may have been connected with the case." [11]

The tenor of this definition accords with traditional usage, for at common law the most usual special plea in bar took the form of confession and avoidance. 1 J. Chitty, Treatise on Pleading and Parties to Actions *551–552 (16th Am. ed. 1883). In criminal cases the most common special pleas in bar presented claims of double jeopardy or pardon, 2 J. Bishop, New Criminal Procedure § 742 (2d ed. 1913), and sometimes the statute of limitations, *id.*, § 799 (5).

A characteristic common to all these definitions is that a special plea in bar did not deny that a defendant had committed the acts alleged and that the acts were a crime. Rather, it claimed that nevertheless he could not be prosecuted for his crime because of some extraneous factor. A situation in which the defendant claims that his act was simply not a crime would be beyond the scope of this test.

Our decisions are consistent with this reading of the "motion in bar" provision. In early cases under the section, the most familiar plea in bar interposed the statute of limitations. *E. g., United States* v. *Goldman*, 277 U. S. 229, 236–237; *United States* v. *Rabinowich*, 238 U. S. 78, 83–84. In other cases defendants have claimed immunity because of prior self-incriminatory testimony or a statutory grant of immunity. *United States* v. *Blue*, 384 U. S. 251; *United States* v. *Hoffman*, 335 U. S. 77, 78; *United States* v. *Monia*, 317 U. S. 424. See also *United States*

[11] 41 Cong. Rec. 2753.

v. *Ewell,* 383 U. S. 116 (speedy trial); *United States* v. *Hark,* 320 U. S. 531 (governing regulation revoked after violation but before indictment); *United States* v. *Thompson,* 251 U. S. 407 (first grand jury refused to indict; charges submitted to second grand jury without court approval); *United States* v. *Celestine,* 215 U. S. 278 (challenge to federal jurisdiction).[12]

Testing the appellee's motion to dismiss by this standard, we think it plain that it cannot qualify as a "motion in bar." The appellee did not deny that he refused to submit to induction, but he claimed that his conduct was not a crime because of the prior denial of counsel. He has not confessed to a crime and claimed immunity from prosecution; he argues that he has committed no crime.

We conclude, therefore, that we have no jurisdiction over this appeal under either the "construction of the statute" or "motion in bar" provisions of the Criminal Appeals Act. Accordingly, this case is remanded to the United States Court of Appeals for the Ninth Circuit for further proceedings in that court.

It is so ordered.

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[12] Only two cases appear difficult to reconcile with the test adopted in text, and these are of dubious parentage. In *United States* v. *Covington,* 395 U. S. 57, and *United States* v. *Murdock,* 284 U. S. 141, defendants were being prosecuted for refusals to answer which they justified on grounds of Fifth Amendment privilege. *Murdock* itself, however, said that the plea was not appropriately presented as one in bar. 284 U. S., at 151. In *Covington,* we cited *Murdock* in assuming jurisdiction. 395 U. S., at 59 n. 2.

SUPREME COURT OF THE UNITED STATES

No. 77.—October Term, 1970

United States, Appellant, v. Thomas William Weller. | On Appeal From the United States District Court for the Northern District of California.

[February 24, 1971]

Mr. Justice Douglas, dissenting.

I believe that the appeal is properly here and I believe that *United States* v. *Mersky*, 361 U. S. 431, is a precedent that sustains my view and may not properly be distinguished as the Court undertakes to do.

In *Mersky* a statute governing the labeling of imported articles was involved. The Act made it mandatory to label articles of foreign origin with "the English name of the country of origin." It also said that the Secretary of the Treasury "may" determine the "words and phrases or abbreviations" which were acceptable "as indicating the country of origin." 19 U. S. C. § 1304 (a).

We held that the Act and the regulation were "so inextricably intertwined" that dismissal of the information "must be held to involve the construction of the statute." 361 U. S., at 438.

In the present case the Court concludes that the provision of the Selective Service Act in issue and the regulations are "far short" of being "inextricably intertwined." But with all respect the only section of the Act quoted is the penal provision defining the crime of refusing to be inducted.[1] The more relevant section is

[1] As we noted only last Term in dealing with this same statute, "[a]s a matter of sound construction, however, 'statute upon which the indictment . . . is founded' should be read to include the entire statute, and not simply the penalty provisions." *United States v. Sisson*, 399 U. S. 267, 280 n. 9.

§ 10 (b)(3), 50 U. S. C. § 460 (b)(3), which reads in relevant part:

> "Such local boards, or separate panels thereof each consisting of three or more members, shall, under the rules and regulations prescribed by the President [§ 10 (B)(1)], have power within the respective jurisdictions of such local boards *to hear and determine,* subject to the right of appeal . . . , all questions or claims with respect to inclusion for, or exemption or deferment from, training and service under this title. . . ." (Emphasis added.)

The question turns on the meaning of *"to hear and determine."* President Truman, pursuant to his rule-making power granted by § 10 (b)(1), promulgated on August 20, 1948, a regulation, 32 CFR § 1624.1, which described the kind of "hearing" to which a registrant is entitled.[2] More precisely does the power "to hear and

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[2] 32 CFR § 1624.1, as promulgated by President Truman, provided in relevant part:

"(a) Every registrant, after his classification is determined by the local board (except a classification which is itself determined upon an appearance before the local board under the provisions of this part), shall have an opportunity to appear in person before the member or members of the local board designated for the purpose if he files a written request therefor within 10 days after the local board has mailed a Notice of Classification (SSS Form No. 110) to him. Such 10-day period may not be extended, except when the local board finds that the registrant was unable to file such request within such period because of circumstances over which he had no control.

"(b) No person other than a registrant shall have the right to appear in person before the local board, but the local board may, in its discretion, permit any person to appear before it with or on behalf of a registrant: *Provided,* That if the registrant does not speak English adequately he may appear with a person to act as interpreter for him: *And provided further,* That no registrant may

determine" include the right of a registrant personally to appear? Does it include the right of a registrant to appear through an attorney or with an attorney? Is the question to be resolved "under the rules and regulations prescribed by the President" or is the Act to be read as including constitutional requirements of counsel? In my view the power "to hear and determine," granted by the Act, may indeed be more intertwined with the regulations than was the Act in the *Mersky* case. For in the latter, the Act, as noted, made it mandatory to label articles of foreign origin with "the English name of the country of origin." The power of the Secretary of the Treasury to promulgate regulations was therefore a power merely to fill in details. In contrast, the present Act leaves to "rules and regulations prescribed by the President" the scope and nature of the power of a local board *"to hear and determine"* the claims of a registrant. Is that constitutionally permissible?

This case, rather than *Mersky,* is more nearly the one where the Act and the regulations are "so inextricably intertwined" that dismissal of the present indictment "must be held to involve the construction of the statute."

The District Court construed "hear and determine" claims of registrants "under rules and regulations prescribed by the President," as those words are used in § 10 (b)(3) of the Act, not to authorize "the constitutionally suspect action of removing the right to be represented by counsel." 309 F. Supp., at 52. The District Court in granting the motion to dismiss accordingly concluded that it was "loathe to hold that the administrative denial of such a right is either authorized by Congress or is

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be represented before the local board by anyone acting as attorney or legal counsel."

Section 1624.1 (a) was amended by President Johnson by Executive Order No. 11350 on May 3, 1967, in respects not material here. 32 F. R. 6961.

constitutional." *Id.*, at 56. We therefore cannot say that the dismissal of the indictment was not based on a construction of the statute that the District Court never considered.

I would not remit the case to the Court of Appeals but decide here and now whether in the circumstances here presented the registrant was entitled to the aid of counsel at the hearing before the Board.